NAVAL DIGEST 1921

CONTAINING

DIGESTS OF SELECTED DECISIONS *of the* SECRETARY OF THE NAVY

AND

OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE NAVY ISSUED SUBSEQUENT TO THE PUBLICATION OF NAVAL DIGEST 1916

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T. ROOSEVELT,
Acting Secretary of the Navy.

NAVAL DIGEST.

ABBREVIATIONS.

1. **In findings and sentence**—Where the rating of the accused is that of chief boatswain's mate, it is improper to indicate same either in the findings or sentence of the court by using the abbreviation C. B. M. The proper form is to spell the rating in full File 26262-4093, J. A. G., 16 Mar., 1918. G. C. M. Rec. No. 37258.) (C. M. O. 30, 1918, 17.)
2. **Unauthorized**—U. S. N. R. F. should be U. S. Naval Reserve Force. (C. M. O. 27, 1919.)

ABSENCE.

1. **Caused by disease contracted through misconduct**—An enlisted man who had been stationed in a hospital for 26 days prior to the expiration of his enlistment with disease resulting from his own misconduct, and who, upon the expiration of his enlistment, was not physically fit for discharge to duty—the date of his eventual and complete recovery being problematic—*Held*, That a man sick in a hospital when his enlistment expires, and whose recovery is problematic, should not be held in the service beyond the actual date of the expiration of his enlistment in order to "make good" time lost, but such time should be made good only in a duty status; that the man in question should be discharged from the service; that proper notation should be made upon the records to show that he had 26 days' time to "make good" before his enlistment could be regarded as complete and that he be retained in the hospital in the status of a patient whose enlistment has expired. (File 7657-394, J. A. G., Nov. 11, 1916.) (C. M. O. 41, 1916, 6.)
2. **Same**—"Hereafter no officer or enlisted man in the Navy or Marine Corps who shall be absent from duty on account of sickness or disease resulting from his own intemperate use of drugs or alcoholic liquors, or other misconduct, shall receive pay for the period of such absence, and the time so absent and the cause thereof to be ascertained under such procedure and regulations as may be prescribed by the Secretary of the Navy: *Provided*, That an enlistment shall not be regarded as complete until the enlisted man shall have made good any time in excess of one day lost on account of sickness or disease resulting from his own intemperate use of drugs or alcoholic liqours, or other misconduct." (39 Stat. 508.)

   Where such disease has been contracted prior to August 29, 1916, pay shall not be deducted for absence on account of such disease. (19 Comp. Dec. 483; File 7657-394, Sec. Nav., 11 Sept., 1916.) Enlisted men shall be required to make good any time lost during their current enlistment in excess of one day on account of sickness or disease resulting from their own intemperate use of drugs or alcoholic liquors, or other misconduct, *only* where such sickness or disease was contracted on or subsequent to August 29, 1916. (19 Comp. Dec. 483; File 7657-394: 1, Sec. Nav., Sept. 30, 1916; C. M. O. 33, 1916, 5.)
3. **Members of court**—Unless such absence reduces court below a legal quorum (five) its proceedings are not invalidated. (C. M. O. 141, 1918, 23.) *See* MEMBERS OF COURTS-MARTIAL.

ABSENCE FROM COMMAND WITHOUT LEAVE.

1. **Sentence of reduction of an officer to an enlisted rating**—Can lawfully be made for this offense, and for no other. (C. M. O. 73, 1918, 2.)

ABSENCE FROM MARINE HOSPITAL.

1. **Enlisted man**, while patient in Marine Hospital, who absents himself without permission, should be reported immediately to his commanding officer for disciplinary action. (C. M. O. 4, 1918, 19.)

ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED.

1. **When arrest and acquittal by civil authorities not a defense to**—Section 3, page 6, Naval Digest, 1916, refers to an unauthorized absence *solely* due to arrest and detention by civil authorities, and when the accused is arrested while on authorized leave. It does not apply when the accused is arrested while absent without leave or after his leave has expired. (File 26251-22032, J. A. G., 12 Dec., 1919; G. C. M. Rec. No. 45910.) (C. M. O. 321, 1919, 11.)

ABSENCE FROM STATION AND DUTY WITHOUT LEAVE.

1. **Finding—not supported by evidence adduced**—An accused in a recent case was found guilty of absence from station and duty without leave. Testimony for the defense, which was straightforward and unimpeached, showed that the accused was ill; that he had received medical attention; that he attempted to communicate these facts to his superior officers; that he intended to return to his station and duty as soon as he was physically able; that he actually started to return before he fully recovered; that his physical condition was such when he reached said station he was immediately taken to the hospital for treatment; and that his physical condition was not due to any fault of his own. Findings and sentence disapproved. (File 26251-18535, G. C. M. Rec. No. 41374.) (C. M. O. 39, 1919, 17.)
2. **Sentence involving "discharge as undesirable" held inadequate**—A discharge other than dishonorable or bad conduct is not considered a punishment. (C. M. O. 129, 1918, 21.)

ABSENCE WITHOUT LEAVE.

1. **Distinguished from desertion.** (C. M. O. 304, 1919, 15.)
2. **In itself does not constitute conduct to the prejudice of good order and discipline.** (C. M. O. 141, 1918, 16.)
3. **Naval personnel assigned to marine hospital.** *See* MARINE HOSPITAL SERVICE.

ACCEPTANCE.

1. **Effects of acceptance of a commission ad interim.** (C. M. O. 4, 1921, 11.)

ACCESSORIES.

1. **As a part of sentence**—An accused was sentenced to be reduced to the rating of * * * and to suffer all the other accessories of said sentence as prescribed by section 349, Naval Courts and Boards, 1917. As no term of confinement, which this provision was intended to accompany, was adjudged, this portion of the sentence relating to accessories, can be given no legal effect, and is therefore considered as surplusage. (C. M. O. 177, 1919, 2.) *See* SENTENCE.
2. **Sentence of officer**—Involving, should be in accordance with the requirements of section 339 and 340, Naval Courts and Boards, 1917. (C. M. O. 134, 1919, 2.)

ACCESSORY. *See* PRINCIPAL AND ACCESSORY.

1. **Distinction between accessory and principal**—The former must be absent, the latter present at the crime. To be guilty as a principal, it is essential that the accused be present, actually or constructively. "He need not be an eye witness or an ear witness to the deed. Thus if a person intends to assist, and is sufficiently near to do so, as where one is watching outside of a house while another is committing a burglary or other felony inside, he is regarded as present. * * * A person, if present, must be a principal, if guilty at all. He can not be an accessory for * * * absence is essential to make one an accessory. (Clark's Criminal Law, sec. 47.) (C. M. O. 85, 1920, 12.)

ACCOMPLICE.

1. **Defined**—"An accomplice * * * is one who is in some way concerned in the commission of a crime. The term includes all who are concerned in the crime, whether as principals in the first or second degree or as accessories. The test by which to determine whether one is an accomplice is to ascertain whether he could be indicted for the offense for which the accused is being tried * * * ." (12 Cyc. 445, 446. File 26251-16180, J. A. G., Aug. 13, 1918; G. C. M. Rec. No. 38991; C. M. O. 106, 1918, 2.)
2. **Legal competency of uncorroborated testimony of**—The legal competency of an admitted accomplice, and the credibility of testimony so given, as indicated by the weight of authorities, supported by decisions rendered in numerous cases in the United States Circuit Court, is that such evidence is to be received with great caution, and, as a general rule, will be rejected unless corroborated, as to material facts stated by such accomplice, by credible witnesses (27 Fed. Cas. 16322). Nevertheless the contrary has also been held in the United States Court of Appeals; and furthermore, the ruling is that it is the exclusive province of the jury to pass on the question of the credit to be

accorded witnesses. In the case of Caminetti *v.* The United States (242 U. S. 495) the court stated "There is no absolute rule of law preventing conviction on the testimony of accomplices if juries believe them."

Attention is also invited to the following citations:

"Although the uncorroborated testimony of an accomplice should be received with caution, yet there is no rule of law forbidding a conviction upon his evidence alone." (Steinham *v.* United States, Fed. Cas. No. 13355.)

"A conviction founded on the uncorroborated testimony of an accomplice is legal, though it is almost universal practice sanctioned by long usage and deliberate judicial approbation, to instruct juries to be cautious in conviction upon such testimony." (United States *v.* Neverson, 1 Mackey, 152.)

"The jury may convict on the testimony of an accomplice alone; but his testimony should be corroborated in some parts, at least, by other evidence." (United States *v.* Kessler, Fed. Cas. No. 15528.)

"The evidence of an accomplice, when submitted to the jury with proper cautions as to its credibility, is for the jury to weigh; and they, if they please, may act upon it without corroborated testimony." (State *v.* Stebbins, 29 Conn. 463; 79 Am. Dec. 223.) (File 16870–47: 289, J. A. G., 24 July, 1919; C. M. O. 237, 1919, 12.) *See also* C. M. O. 106, 1918.

3. **Officer**—Giving a subordinate an order to do an unlawful act becomes an accomplice in the crime. "A soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor his oath to do it. So far from such an order being a justification, it makes the party giving the order an accomplice in the crime." (U.S. *v.* Carr, 25 Fed. Cas. 307, C. M. O. No. 212, 1919, 5; G. C. M. Rec. No. 43536.)
4. **Stealing property of the United States intended for the naval service**—Where acts are accomplished with the knowledge, collusion and assistance of those having custody of property, they are accomplices. (C. M. O. 106, 1918, 2.)
5. **Testimony of**—Accomplice is a competent witness; testimony viewed with caution, but need not be corroborated. (C. M. O. 106, 1918, 2.)
6. **Weight to be given testimony.** (C. M. O. 114, 1918, 20.)

ACCUSED.

1. **Admissions by**—Of all substantial and necessary averments. (C. M. O. 210, 1919; G. C. M. Rec. No. 44109; C. M. O. 213, 1919; G. C. M. Rec. No. 44108.)
2. **As witness.** *See* WITNESSES.
3. **Same**—Scope of cross-examination of. In Fitzpatrick *v.* United States (178 U. S. 315) it is stated:

"Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime." (*See* Naval Courts and Boards, 1917, sec. 161.)

"An accused person may at his option, take the stand as a witness, but in so doing, he occupies no exceptional status, and becomes subject to cross-examination like any other witness. As a witness, he cannot be permitted to state only circumstances favorable to himself and maintain silence as to the other facts in the case; nor, as it has been repeatedly held, can he read or put in an ex parte 'statement,' sworn to, as his testimony. The same rules as to the admissibility of evidence, privilege of the witness, impeaching of his credit, etc., will apply to him as to any other witness, and the only noticeable difference between his attitude and that of other witnesses will be that he will be in general naturally and properly enough be exposed to a more searching cross-examination, * * *. Such testimony will always be fair material for a rigid cross-examination, and as it has been observed by the U. S. Supreme Court, 'a greater latitude is undoubtedly allowable in the cross-examination of a party who places himself on the stand than in that of other witnesses. Still, where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent is very largely subject to the control of the court in the exercise of a sound discretion.'" (Rea *v.* Missouri, 84 U. S. 542; Win. Mil. Law and Precedents, vol. 1, pp. 508 and 544–545.)

But it has been held, and it is believed properly so, where the accused took the stand to testify, and did testify, only as to the date of his confinement in arrest, that it would be inquisitorial and illegitimate to cross-examine him as to other facts of the merits of the case. (Winthrop's Military Law and Precedents, vol. 1, p. 509, note.)

Again, when an accused voluntarily takes the stand as a witness in his own behalf and denies the commission of the crime with which he is charged, a very wide latitude of cross-examination is allowed. (State *v.* Rogers, 77 Pac. 293.)

"A defendant who voluntarily takes the stand and broadly denies the crime thus waives his constitutional privilege, and may be cross-examined on all facts relevant and material to the issue." (Thomas *v.* State, 103 Ind., 419; 2 N. E., 808.)

"A defendant who goes upon the stand and denies his guilt may be cross-examined upon every fact and circumstance that led up to it, or rendered it more probable." (Commonwealth *v.* Burke, 3 Lanc. Law Rev. 138.) (File 26251-15777, G. C. M. Rec. No. 37122, C. M. O. 37, 1918. *See also* C. M. O. 35, 1920, for exhaustive discussion.)

4. **Same**—Cross-examination of, concerning character—It is generally accepted as a rule of law, "that an accused person taking the stand as a witness may be impeached for perjury like any other witness, i. e., by reputation as evidence of character, by cross-examination as to character, by conviction of crime, and the like." (Greenleaf on Evidence, 16th Ed. vol. 1, pp. 568-569.) It follows also that only such character as affects his testimony may be used against him until he sets up his character as evidence of innocence, then his general character may be inquired into (Id.). In the present case the question put to the accused regarding his enlistment under an assumed name, which was objected to by his counsel, was a fair one, as it had to do with his character as to truth and veracity. The other questions asked him regarding his conviction of crime, and the assault upon a negro were not objected to by his counsel, but had they been objected to the objection should have been overruled on the ground that the accused had put his general character in evidence as proof of his innocence. (File 26262-5400, G. C. M. Rec. No. 40814, C. M. O. 190, 15, 1918.)
5. **Same**—In extenuation—Record should contain proper notation that the accused takes the stand at his own request as a witness in extenuation of his acts, and not that accused was at his own request duly sworn as a witness in his own behalf. (*See* C. M. O. 127, 1918, and Naval Digest, 1916, WITNESSES, 13, 63. C. M. O. 40, 1919; G. C. M. Rec. No. 42011. File 26251-18252, G. C. M. Rec. No. 40846, C. M. O. 174, 1918, 21.)
6. **Constitutional rights.** *See* CONSTITUTIONAL RIGHTS OF ACCUSED.
7. **Cross-examination of witness**—Right to. *See* CONSTITUTIONAL RIGHTS OF ACCUSED.
8. **Designation and name of accused in sentence.** *See* NAME AND DESIGNATION OF ACCUSED.
9. **Detail of counsel for.** (C. M. O. 7, 1921. 11.)
10. **Erroneous designation**—Where an accused was erroneously designated as lieutenant commander instead of lieutenant (his true rank, although due for promotion) held, that inasmuch as rank is merely descriptive, and, further, no objection was taken thereto by the accused, the error did not invalidate the proceedings. (C. M. O. 16, 1919. G. C. M. Rec. No. 41080.)
11. **Error in first name of**—In specification, if unobjected to is not a fatal defect. (C. M. O. 39, 1919, 16. File 26251-18697, G. C. M. Rec. No. 41566.)
12. **Failure to accord right to make statement, not fatal**—In reviewing a recent case it was noted that the record failed to state that the accused was accorded an opportunity to make a statement. Since it is the right of the accused to make a statement, either orally or in writing, if he waives the right the fact that it was accorded him and not taken advantage of should be affirmatively indicated upon the record of proceedings. (*See* Naval Digest, 1916, Statement of accused, 34.) However, it has heretofore been held that this error, though material, is not sufficient to invalidate the proceedings. (*See* G. C. M. Rec. No. 21279, and C. M. O. 49, 1910, 5.) (File 26262-5577, G. C. M. Rec. No. 41342; C. M. O. 77, 1919, 18.)
13. **Joinder, trial in.** *See* JOINDER, TRIAL IN.
14. **May waive assistance of counsel**—The right of a defendant in a criminal case in a court of the United States to have the assistance of, and to be heard by, counsel is absolutely guaranteed by the Constitution of the United States (sixth amendment). This is a fundamental right which may be waived by the accused but which can not be denied by the court or by the convening authority. (*See* secs. 253, 254, 255, 266 and 267, Naval Courts and Boards, 1917.) In all cases the accused should be advised of his right to have counsel, and if he states that he does not desire assistance of counsel, he is thereby deemed to have waived his constitutional right to be so represented unless he is mentally incompetent to make a decision in the matter, in which event the convening authority may, if he considers that the interests of the accused may

not be sufficiently safeguarded by the judge advocate (sec. 255, Naval Courts and Boards, 1917) assign counsel to represent the accused even though the accused has expressly stated that he does not desire counsel. It should be borne in mind, however, that the convening authority has no power to force counsel upon an accused unless the accused is mentally incompetent and thereby unable to look after his own interests. (*See* Dietz *v.* State, 149 Wis. 462; American and English Annotated cases, 1913 C. p. 732, and footnotes, pages 739–740.) (File 26254–358, J. A. G., 15 Apr., 1919; C. M. O. 153, 1919, 29.)

15. **Pay, forfeiture of, by sentence.** *See* PAY.
16. **Position assumed**—The principle is well settled, that, in criminal (naval court-martial) as well as in civil cases, a defendant (accused) must be held to the position which he assumes and upon which he requests and secures a favorable judgment or other personal advantage. (Peo. *v.* Meakim, 61 Hun (N. Y.) 327.) (C. M. O. 22, 1916, 7.)
17. **Rating of**—Failure to arraign and find under correct rating does not invalidate proceedings, findings and sentence. An accused with the rating of mess attendant third class, was improperly arraigned by the judge advocate as mess attendant, second class; his true rating was not established by any of the witnesses called, and in the findings of the court he was designated as simply mess attendant. It was held, however, that the proceedings, findings and sentence of the court were not invalidated by the above-mentioned irregularities. (File 26262–5780, G. C. M. Rec. No. 41782; C. M. O. 39, 1919, 18.)
18. **Right of**—To have full justice accorded him and to have witnesses summoned and produced, notwithstanding delay occasioned thereby. (C. M. O. 147, 1919, 2.)
19. **Right to counsel.** *See* CONSTITUTIONAL RIGHTS OF ACCUSED.
20. **Statement of**—When not represented by counsel; record should show that section 253 (a) of Naval Courts and Boards, 1917, has been complied with. (C. M. O. 177, 1919, 2; G. C. M. Rec. No. 43131.)
21. **Witness in own behalf**—Scope of cross-examination of. (C. M. O. 11, 1921, 8.)
22. **Same**—Admits the allegations of the specification and the charge, and endeavors to justify his actions by the serious conditions existing at the station, and that his actions were acquiesced in, and in accordance with, the order of his superior officer. *Held*, this does not constitute a defense. (C. M. O. 212, 1919, 5; G. C. M. Rec. No. 43536.)
23. **Counsel**—Criticism of. (C. M. O. 8, 1921, 10.)
24. **Statement**—Inconsistent with plea. (C. M. O. 5, 1921, 17; 7, 1921, 11.)

ACQUITTAL.

1. **Authorized forms of acquittal**—"*The court does, therefore, acquit.*" This form, which will be herein referred to as a *simple acquittal*, should be used in all cases except in the few special cases to be hereinafter mentioned under other forms of acquittal. The use of this form sufficiently records the fact that the court has not sustained the charge and has the same legal effect as an acquittal expressed with some embellishment.

"*The court does, therefore, fully acquit.*" The use of this form of acquittal shows that the court not only fails to find a charge proved beyond a reasonable doubt, but that it finds no facts whatever, as brought out by the evidence introduced in the case, which reflect adversely on the conduct of the accused in connection with matters pertaining to the charge and specification. In other words, a court should not "fully acquit" in cases where the record shows any uncontroverted facts whatever reflecting upon the accused.

"*The court does, therefore, honorably acquit.*" This form is to be employed only in cases where the offense charged is, besides being an offense against military authority, of such a character that a conviction thereof would tend to dishonor the accused, such as, for example, a charge of "conduct unbecoming an officer and a gentleman." This acquittal, as in the case of a full acquittal, should never be used if the record shows any adverse reflection whatever upon the accused.

"*The court does, therefore, most fully and honorably acquit.*" This form should be used only in extreme cases in which not only have the requirements of a "full" and "honorable" acquittal been fulfilled, but in which the court wishes to place the highest stamp of approval upon the actions of the accused in connection with matters covered by the specifications. The use of this form of acquittal might, for example, be justified in the case of an officer charged with unbecoming conduct in battle if the court wished to make it a matter of record, that, far from considering the conduct of

such officer censurable, it both approved and commended his conduct. For examples of improper use of this form of acquittal, *see* C. M. O. 5, 1913, 2–3; 27, 1913, 9; 41, 1915, 11.

It will be noted that there is no *legal* distinction between a simple acquittal and one to which one of the additional expressions above quoted has been added, and it is to be emphasized that only in exceptional cases is the use of any form of acquittal, other than the simple "acquit," justified. Unless this rule be strictly adhered to and other form of acquittal reserved for special cases, the distinction drawn above will soon be lost and not only would a simple acquittal be robbed of its full absolving significance, but also the proper purposes for which the other forms of acquittal are reserved would be defeated. (File 26251–12138, Aug. 16, 1916; G. C. M. Rec. No. 32390; C. M. O. 29, 1916, 2–3.)

2. **A chief gunner was "most fully and honorably acquitted" of one of four charges**—The department stated that "the use of this form of acquittal was not in accord with the requirements therefor laid down in C. M. O. 29, 1916." (C. M. O. 38, 3, 1916. *See also* C. M. O. 41, 1915.)
3. **Basis of**—The fact that an accused had not been given special instructions in his duties might have been grounds for recommendation to clemency but not for an acquittal. (C. M. O. 156, 1919; G. C. M. Rec. No. 42612.)
4. **Drunkenness**—"In reviewing, it is noted that the accused was acquitted of the charge of 'Drunkenness' and that he plead guilty to the charge of 'Absence from station and duty after leave had expired.' The evidence adduced shows such extenuating circumstances that punishment for the technical absence over leave is shown to be unnecessary. The acquittal of the accused on the main charge of 'Drunkenness' removes the seriousness from the charge of absence over leave." (C. M. O. 58, 1919; G. C. M. Rec. No. 42335.)
5. **"Most fully and honorably acquit"—Improper use of**—This form of acquittal should be used only in extreme cases, in which not only have the requirements of a "full" and "honorable" acquittal been fulfilled, but in which the court wishes to place the highest stamp of approval upon the actions of the accused in connection with matters covered by the specification of the charge. (Sec. 323, Naval Courts and Boards, 1917.) (C. M. O. 224, 1919; G. C. M. Rec. No. 44408.)
6. **No authority will return record for reconsideration of**—"The President of the United States, as recently as 14 July, 1919, has directed, with regard to this matter, as follows:

"'No authority will return a record of trial to any military tribunal for reconsideration of—

"'1. (*a*) An acquittal.

"'(*b*) A finding of not guilty of any specification.

"'(*c*) x x x.

"'(*d*) The sentence originally imposed, with a view to increase its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

"'2. No military tribunal in any proceedings on revision shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is herein prohibited * * *.' G. O. No. 88, War Dept., 14 July, 1919.

"It would appear that the return of a naval case to a naval court for reconsideration of an acquittal, or to impose a more severe sentence upon a conviction, would be in direct contravention of the President's published policy in the premises and of his mandate to courts of the military service. Legislation now pending before Congress provides inter alia that cases of acquittal shall not be returned to any Army court-martial for reconsideration." (H. R. 367.) (C. M. O. 309, 1919; G. C. M. Rec. No. 45473.)

7. **Revision**—Court neglected to show that it had adhered to its acquittal. (File 26251–12159, Oct. 30, 1916, 1.)
8. **Simple acquittal**—"The court does, therefore, acquit," termed the "simple acquittal," is one of the four authorized forms of acquittal. (C. M. O. 29, 1916, 2.)
9. **Acquitted because of youth**—A careful review of the case leads to the conviction that the court acquitted because of his comparative youth, and because he was associated on the bridge with the captain and division commander, which, if correct, is not justified and does not protect the Government in the navigation of its vessels, would establish an undesirable precedent, and would evade the spirit of the Navy Regulations, which is to impose concurrent responsibility on the navigator for the safety of the ship. (C. M. O. 24, 1916, 4.)

ACT.
1. Necessary to constitute offense of "conduct to the prejudice of good order and discipline." (C. M. O. 2, 1921, 16.)

ACT OF JUNE 4, 1920.
1. Construction of some of its provisions. (File 15229–20, J. A. G., 9 July, 1920.) (C. M. O. 101, 1920, 25.)

ACTING ENSIGN.
1. For engineering duty only. *See* ENGINEERING DUTY ONLY.

ACTING PAY CLERK.
1. An enlisted man so appointed is entitled to a discharge. *See* DISCHARGE.
2. Revocation of appointment.—The Secretary of the Navy has power to terminate at will appointments of acting pay clerks. The law provides the method of appointment, but does not attempt to control the tenure of office, except in so far as to give them the same status as other acting warrant officers, whose appointments are subject to revocation by the appointing power. (File 5460–118, J. A. G., 23 Oct., 1917.) (C. M. O. 67, 1917, 15.)

ACTING WARRANT OFFICERS.
1. Deposits. *See* DEPOSITS.

ADDITIONAL NUMBER. *See* PROMOTION.
1. Officers designated for engineering duties only—Promotion to higher grade. Information having been requested as to whether an officer designated for engineering duties only in accordance with the act of August 29, 1916, while serving in the grade of commander, would become an additional number immediately upon his designation of promotion to a higher grade, the Judge Advocate General held that such officer would not become an additional number immediately upon designation, but would become an additional number only upon his promotion by selection to a higher grade, which opinion was approved by the Secretary. (File 28687–24:4, J. A. G., 7 Oct., 1919; C. M. O. 296, 1919, 11.)

ADDITIONAL NUMBERS IN GRADE. *See also* ENGINEER OFFICERS.

ADEQUATE SENTENCES.
1. Courts-martial—Loss of three numbers as punishment for drunkenness to which accused pleaded guilty, totally inadequate. (C. M. O. 44, 1916.)

ADJOURNMENT OF COURT. *See* COURT.

ADJOURNMENT.
1. Court erred in not taking an adjournment before the close of the trial in order that the defense might procure the attendance of witness requested to testify. (C. M. O. 144, 1919; G. C. M. Rec. No. 42545.)

ADMINISTRATION OF NAVAL DISCIPLINE.
1. Officers of the National Naval Volunteers—The section commander of a section of a naval district, when a commander of the National Naval Volunteers, or other officer of the Navy, has authority to administer discipline upon the persons of the various services under his command, operating as a part of the Navy, in accordance with the laws and regulations of the Government of the Navy, subject to any specific restrictions of law, regulations, or orders applying to any particular case. He has also all the necessary authority to order summary and deck courts within his command, subject only to the restrictions of General Order No. 296, revised, as to the constitution of courts-martial ordered upon enlisted men of the regular Navy or of any of the services acting with the Navy under the order of the President. (File 28762–278, J. A. G., 10 Dec., 1917.) (C. M. O. 88, 1917, 14.)

ADMISSIONS. *See also* PLEA.
1. Accused—At outset of trial admitted authorship of the letter quoted in full in one of the specifications. This admission was made subject to the reservation, viz, right of accused to object to the admission of letter itself in evidence. This reservation was purely *pro forma* and without any legal bearing upon the case because, the accused having admitted the authorship of the letter as set forth in the specification, it was thereby made unnecessary to introduce it, and it should not thereafter have been offered in evidence by the judge advocate. The letter was already as fully before the court as though the original had been legally introduced, and thus having been made a part of the record, the subsequent proceedings can not have the effect of excluding it from consideration. (File 26251–12159, 9 Dec., 1916, par. 27.)

2. **Evidence**—When accused admits in open court that certain parts of the specification are true it is not necessary for the judge advocate to prove the allegations so admitted. (File 26251-12159, Dec. 9, 1916, p. 10.)
3. **In open court by counsel**—An accused pleaded not guilty to the charges and specifications preferred against him. Shortly thereafter counsel stated that the accused would have entered a plea of guilty if, in the judgment of his counsel, a conviction on the charge as alleged would have been his protection in later years against a charge brought against him for the actual occurrence. Counsel stated further: "If you will follow me, we will make these admissions: The defendant will admit, * * *." Counsel then proceeded to admit every allegation contained in the specification, substituting the amounts of money and initials in the name alleged to be forged. *Held*, that the aforesaid extensive and material admissions made by counsel, are a judicial confession of the facts included therein, and in this case was equivalent to a plea of guilty to the specifications, and being made by counsel without any indicated authority therefor, are a nullity. It was therefore error on the part of the court under the circumstances set forth to have accepted and considered the same without the express assent thereto of the accused. (File 26251-16817; G. C. M. Rec. No. 37417.) (C. M. O. 30, 1918, 17.)
4. **By counsel**—"Where, in a criminal case, the counsel for the prisoner made certain admissions, it was held that the jury ought not to give to them the slightest weight." (14 Cent. Dig., sec. 1254 (c).) (File No. 26251-15817.) (C. M. O. 30, 1918, 18.)
5. **Same**—"A conviction of larceny can not be predicated on the admissions of counsel, and it is an error to charge that counsel have admitted the stealing with felonious intent, and the only question is as to the value of the property." (People *v.* Hall, 48 N. W. 869.) (File No. 26251-15817.) (C. M. O. 30, 1918, 18.)
6. **Same**—"No admissions by accused's counsel of material averments are evidence against him, or a proper subject for the consideration of the jury." (Clayton *v.* State, 4 Tex. App. 515; 14 Cent. Dig. sec. 897 (n).) (File No. 26251-15817.) (C. M. O. 30, 1918, 18.)
7. **Same**—In some cases where the admissions made by counsel are not of so material and extensive a nature it might be held that the accused being present and making no objection to such action of his counsel, the consent or authorizatiion may be implied, yet in a case such as the one under consideration, where the admissions cover the allegations set forth in the specifications in their entirety, it was the opinion of the Acting Judge Advocate General that no such implication should be inferred, but that it should be affirmatively indicated by the accused. (File 26251-15817.) (C. M. O. 30, 1918, 18.)
8. **Plea of guilty distinguished**—"A plea of guilty is a judicial confession and dispenses with evidence to prove the facts as set forth in a specification. To a lesser extent an admission in open court of any material facts set forth in a specification when such admission is voluntarily made by the accused or by his counsel in his presence *and with his express or implied authority*, is a judicial confession of such fact and dispenses with the necessity of evidence to establish same." (File 26241-15817.) (C. M. O. 30 1918, 18, citing C. M. O. 5, 1917, 6.)

ADMONITION. *See also* LETTERS OF REPRIMAND.

1. **Retired officer**—Admonished for accepting employment with a Government contractor. *See* RETIRED OFFICERS—Government contractors.

ADVANCEMENT IN RANK.

1. Over other officers whose present commissions antedate that of the applicant, can be done by the President, under existing law, only for eminent and conspicuous conduct in battle or extraordinary heroism. (File 26261-246: 1, March 18, 1914; 26261-246: 2, Dec. 8, 1916; 26262-1794: 1, Dec. 21, 1916.) (C. M. O. 46, 1916, 8.)

ADVERSE COMMENT.

1. On failure of accused to testify. *See* CONSTITUTIONAL RIGHTS OF ACCUSED.

AGE.

1. **Ineligibility for transfer from Naval Reserve to Regular Navy, on account of.** (C. M. O. 2, 1921, 2.)

AGE LIMIT. *See also* PROMOTION.

1. **Chief pharmacist for assistant surgeon.** *See* CHIEF PHARMACIST.
2. **For appointment under act of 4 June, 1920**—When increased for prior service in the National Naval Volunteers, Naval Militia, Naval Reserve Force, and Coast Guard, such service must have been on active duty with the regular Navy or in the Navy or Marine Corps. (File 29226-16, Nov. 6, 1920; C. M. O. 133, 1920, 14.)

AGGRAVATING CIRCUMSTANCES.

1. **Distinguishing one charge from another and avoiding multiplicity.** (C. M. O. 175, 1919, 2; G. C. M. Rec. No. 43145.)

AIRCRAFT.

1. **License for civilian pilots of.** (C. M. O. 209, 1919, 19.)

ALCOHOLIC LIQUOR.

1. **Section 12 of the selective draft act construed**—The Attorney General advised the department that he had administratively construed section 12 of the above-mentioned act as covering the entire military establishment of the United States, including the Navy and Marine Corps. (C. M. O. 37, 1917.)

ALCOHOLISM.

1. **Absence caused by.** *See* ABSENCE.

ALIAS.

1. **Finding and sentence**—The alias of the accused should not be omitted in the finding and sentence. (C. M. O. 9, 1916, 5.)

ALIEN ENEMY.

1. **Status for enlistment**—There is nothing in the laws of the United States or the regulations for the government of the naval service which prohibits the reenlistment into the Marine Corps of an alien who has declared his intention to become a citizen of the United States, but whose naturalization may not, under the law, be consummated by reason of the fact that the country of which such alien is a subject is at war with the United States.

   Whatever may be the desire and intention of such alien as to severing his relations, with the country of his nativity (Germany), he is not a citizen of the United States; if captured by German forces bearing arms against them he might be dealt with as a traitor; should he refuse battle when confronted by the enemy and thereupon be tried by United States general court-martial for such failure to engage the enemy, his resultant punishment might be made the basis of a legitimate complaint, at the close of the war, by the nation of which he is a subject. (File 7657–488, J. A. G., 20 Sept., 1917; C. M. O. 58, 1917, 10.)

ALLOWANCES.

1. **Retired officers.** *See* PAY.

APPEAL.

1. **From court-martial to Secretary of the Navy.** *See also* MEMORANDUM OF LAW.
2. **Same**—Because letter from department improperly read before court and influenced it. *Held*, accused having pleaded guilty to charges referred to in letter, views therein as to seriousness of offenses of accused were properly matter for consideration in reconsidering sentence held by convening authority to be wholly inadequate. (G. C. M. Rec. No. 46377; C. M. O. 31, 1920, 7.)
3. **Same**—On ground that conviction based on documentary evidence of record of court of inquiry and sentence should have been loss of 100 numbers and not dismissal (citing sec. 390, Naval Courts and Boards, 1917). *Held*, as accused pleaded guilty, the conviction was based on plea. Court of inquiry record read at request of accused. (G. C. M. Rec. No. 46377; C. M. O. 31, 1920, 6.)
4. **Same**—On ground of lack of jurisdiction, having been placed on inactive duty in the reserve. *Held*, court-martial had jurisdiction. (G. C. M. Rec. No. 46377; C. M. O. 13, 1920, 6.)
5. **Same**—On ground of inconsistency of evidence in extenuation, with plea, having shown justifiable cause for the offense to which he pleaded guilty. *Held*, no inconsistency, as cause justifiable in law is meant. (G. C. M. Rec. No. 46377; C. M. O. 31, 1920, 6.)

APPEARANCE AND MANNER OF WITNESSES. *See* WITNESSES.

APPLICANT. *See* DESERTER.

APPLICANTS FOR ENLISTMENT.

1. **Status of**—An applicant not having completed his enlistment by being sworn in, is not in the military service. (File 28909–229, Sec. Nav., 18 June, 1919; *see also* C. M. O. 39, 1919, 22.) (C. M. O. 209, 1919, 20.)

APPLICANTS FOR ENLISTMENT IN MARINE CORPS.

1. **Who die before completion of contract are civilians.** (C. M. O. 39, 1919, 22.)

APPOINTING POWER.

1. **Congress and the President**—"Although the appointing power alone can designate an individual for office, either Congress by direct legislation, or the President by authority derived from Congress, can prescribe qualifications and require that the designation shall be made out of a class of persons ascertained by proper tests to have these qualifications; * * *." (13 Op. Atty. Gen. 516; *see also* 26 Op. Atty. Gen. 502.) (File 28687-4:4, J. A. G., 12 Sept., 1916.) (C. M. O. 3, 1917, 8.)
2. **Congress and the President, respectively**—Question has repeatedly been raised as to the power of Congress to control the President's power of appointment which, under the Constitution, is subject only to the concurrence of the Senate. The authorities upon this question established the following:
   (1) That Congress has not the power to designate an appointee by name. (18 Op. Atty. Gen. 18; U. S. *v.* Ferreira, 13 How. 40.)
   (2) That Congress has not the power to require the appointment of an individual who stands highest upon a competitive examination. (13 Op. Atty. Gen. 516.)
   (3) That Congress can not require the President to appoint to a vacancy in the military service the senior officer in the next lower grade. (30 Op. Atty. Gen. 177.)
   The above propositions all rest upon the underlying principle that "the power of appointment of officers, the duty to appoint whom devolves directly upon the President and Senate by virtue of the Constitution itself, is one involving a discretion not entirely to be controlled by Congress. This power is from a source above Congress, namely, the Constitution, and can not be destroyed by the inferior power." (30 Op. Atty. Gen. 177.) The foregoing authorities therefore, if they do not clearly define the respective powers of Congress and the President, at least leave no doubt that Congress has not the power to require the appointment of a particular individual either by name or description. This, of course, applied equally to promotion, for a promotion is "an appointment to a higher office." (30 Op. Atty. Gen. 177.) (File 26287-4:4, J. A. G., 12 Sept., 1916.) (C. M. O. 3, 1917, 8.)
3. **Judgment of others**—The appointing power may avail itself of the judgment of others as one means of information. For want of personal knowledge of candidates, it has habitually done so from the foundation of the Government. But this has been done in its discretion. (13 Op. Atty. Gen. 516.) (File 13707-58, J. A. G., Dec. 29, 1916.)
4. **Of Congress**—Congress can not require that designated individuals be appointed to designated offices, the power of selecting appointees being vested in the President by the Constitution itself. (File 13707-58, J. A. G., Dec. 29, 1916.)

APPOINTMENT. *See* PROMOTION.

1. **Acting pay clerk may be revoked.** *See* ACTING PAY CLERK.

APPOINTMENTS.

1. **Commissions in Guardia Nacional Dominicana.** *See* GUARDIA NACIONAL DOMINICANA.
2. **Distinguished from reinstatements as affecting issuance of probationary commissions**—The act of August 29, 1916 (39 Stat. 610-611), by its language, does not contemplate the issuance of probationary appointments to former officers of the Marine Corps reinstated as second lieutenants, after successfully passing the required examinations, and the purpose of Congress to this effect is manifested by the difference in the nature of examinations prescribed for former officers as compared with those required of original appointees. (Cf. 48 Ct. Cls. 386.) (File 13261-544:1, J. A. G., Oct. 10, 1916.) (C. M. O. 37, 1916, 8.)
3. **Probationary officers appointed under the provisions of act of 29 August, 1916**—A probationary officer appointed under the provisions of the act of 29 August, 1916, is entitled to be retired for physical disability arising in the line of duty. (*See* File 26253-550, Feb. 18, 1918; File 13707-72, J. A. G., 31 May, 1919.) (C. M. O. 186, 1919, 44.)

APPOINTMENTS, ACTING.

1. **Holders are entitled to precedence, etc.** *See* COMMAND, FLEETS AND SQUADRONS.

APPOINTMENT, PERMANENT.

1. **Effects of permanent appointment in lower grade upon temporary appointment in higher**—If an officer who is now a temporary lieutenant (junior grade) is actually commissioned an ensign in the permanent Navy, prior to the termination of his temporary appointment, he will, of course, render no service as an ensign until the termination of his temporary appointment as lieutenant (junior grade), at which time he will revert to the grade of ensign or to any higher grade to which he may in

the meantime have become entitled to promotion. The act of 22 May, 1917, also provides "that no person who shall receive a temporary appointment shall be entitled to pay or allowances except under such temporary appointment." His pay, therefore, will be that of his temporary rank. (File 26806-155, J. A. G., 24 Apr., 1918.) (C. M. O. 37, 26, 1918.)

APPOINTMENTS, PROVISIONAL.

1. **Court should expressly state that provisional appointment is to be revoked in sentence of reduction in rating.** (C. M. O. 177, 1919; G. C. M. Rec. No. 43131.)

APPOINTMENT, TEMPORARY.

1. **Ad interim appointment of temporary ensign**—There is no legal objection to the issuance of ad interim appointments as temporary ensign to commissioned warrant officers, warrant officers, and others appointed under the act of 22 May, 1917, during the recess of the Senate. Persons so appointed may be included in any redistribution of the commissioned personnel in the various ranks and grades as authorized by the act of Congress approved 29 August, 1916, and May 22, 1917. (File 26521-221, J. A. G., 12 Oct. 1917.) (C. M. O. 67, 1917, 16.)
2. **Distinguished from acting appointment as bearing on the right to discharge.** *See* DISCHARGE.
3. **Enlisted men whose enlistments expire during the continuance of their temporary appointments**—There is no obligation on the part of the Government to discharge men temporarily appointed as warrants and commissioned officers, under the act of 22 May, 1917, whose enlistments expired while holding such appointments. Withholding their discharges and final settlements under such circumstances does not amount to retaining them in the service within the meaning of section 1422 of the Revised Statutes as amended by the act of 3 March, 1875 (18 Stat. 484). By their acceptance of such appointments under the conditions imposed by the statute of 22 May, 1917, they are deemed to have voluntarily waived their right to discharge upon the expiration of their terms of enlistment and to have accepted all of the conditions imposed by the statute including the requirement that upon the termination of their temporary appointments they "shall revert to the grade, rank, rating from which temporarily advanced," unless in the meantime they become entitled to promotion to a higher grade in the permanent Navy or Marine Corps. (File 7667-445, J. A. G., June 21, 1917.) (C. M. O. 37, 14, 1917.)
4. **Holders therof do not lose rank upon receiving permanent commissions**—An officer of the Navy holding a temporary appointment in a certain grade will, upon being found qualified and given a permanent commission in such grade as of a later date, take rank in such grade as from the date of his temporary commission in same, and not from the date of his later permanent commission. (File 11130-47, J. A. G., Nov. 28, 1917.) (C. M. O. 72, 1917, 20.)
5. **National Naval Volunteers**—An officer of the National Naval Volunteers may be given a temporary appointment as an ensign of the Regular Navy under the act of May 22, 1917, without being required to sever his connections with the National Naval Volunteers upon the acceptance of such temporary appointment. However, an officer of the National Naval Volunteers, appointed a temporary ensign of the Navy, can receive no compensation except under his appointment as a temporary officer of the Navy. (File 26251-221:1, J. A. G., Nov. 22, 1917.) (C. M. O. 72, 1917, 20.)
6. **Naval Reserve Force**—In the case of a chief pharmacist's mate in the Fleet Naval Reserve, who was appointed a pharmacist (temporary) in the Regular Navy. (File 28550-169, J. A. G., Nov. 13, 1917.) (C. M. O. 72, 1917, 20.)
7. **Revoked, officer.** (C. M. O. 310, 1919; G. C. M. Rec. No. 45757.)
8. **Revocation.** *See also* COMMISSION.
9. **Staff officers of temporary and permanent tenure**—A staff officer below the rank of lieutenant commander, whether permanent or temporary, is entitled to advancement in rank with the line officer with whom or (if no line officer was appointed on the same day) next after whom he was appointed, irrespective of whether such line officer holds a permanent or temporary appointment. If, however, a staff officer of permanent tenure below the rank of lieutenant commander is given a temporary appointment in the next higher grade his permanent office is none the less preserved and he is entitled, under the act of May 22, 1917, to receive the rank, pay, and allowances that he would have received except for the passage of said act. Accordingly, he would be entitled to permanent advancement in rank with the permanent officer of the line with or next after whom he was appointed. (File 28687-23, J. A. G., Nov. 19, 1917.) (C. M. O. 72, 1917, 19.)

10. **Warrant officers to the grade of chief warrant officers**—The provisions of the act of 22 May, 1917, providing for temporary appointment (and advancement) of additional commissioned officers of the Navy and Marine Corps, do not cover the temporary appointment of commissioned warrant officers and the only remaining authority for such appointment is to be found in the law as it existed prior to the act of 22 May, 1917, which authorized the appointment of warrant officers to the grade of commissioned warrant officer only after six years from the date of warrant and subject to examination in accordance with regulations prescribed by the Secretary of the Navy. (File 17789–46, J. A. G., 19 Dec., 1917.) (C. M. O. 88, 1917, 18.)

APPOINTMENT, TEMPORARY AND PERMANENT.

1. **Effect on precedence; and as to permanent and temporary commission**—(1) John Doe was appointed an assistant surgeon (temporary) in the Navy with the rank of lieutenant (junior grade) from 17 November, 1917. His "running mate" in the line was Richard Roe, lieutenant (junior grade) in the permanent Navy, ranking from 15 October, 1917. John Doe was appointed an assistant surgeon in the permanent Navy with rank of lieutenant (junior grade) from 18 January, 1918. The regular lieutenant (junior grade) of the line next after whom he was appointed is the said Richard Roe, who ranks as such from 15 October, 1917, and the temporary lieutenant (junior grade) of the line, next after whom he was appointed, is Thomas Jones, ranking as lieutenant (junior grade) from 1 January, 1918. The appointment of John Doe as an assistant surgeon in the permanent Navy with date of rank from 18 January, 1918, is an original appointment in the permanent Navy, and pursuant to law, he takes rank from the date of his commission (act of 4 Mar., 1913, ch. 148), and therefore he loses his original date of precedence in the rank of lieutenant (junior grade) by reason of such appointment in the permanent Navy. (2) Assume the facts as above except that Richard Roe is a temporary lieutenant (junior grade) and Thomas Jones is a permanent lieutenant (junior grade). No other lieutenant (junior grade) of the line, either permanent or temporary, being appointed between 1 January, 1918, and 18 January, 1918. John Doe's "running mate" for either temporary or permanent promotion is Thomas Jones. (File 11130–37:4, J. A. G., 12 Mar., 1918.) (C. M. O. 30, 1918, 31.)

APPROVALS.

1. **Sentence**—Approved by convening authority in order that the accused might not entirely escape punishment. (C. M. O. 126, 1919; G. C. M. Rec. No. 42611.)
2. **Same**—In revision. By convening authority although sentence deemed inadequate to offense found proved, due to impracticability of reconvening court. (C. M. O. 141, 1919; G. C. M. Rec. No. 41317.)

ARGUMENT.

1. **Counsel for accused.** (C. M. O. 11, 1921, 11.)
2. **Incorrect statements of judge advocate in**—It is realized that a great deal of latitude should be allowed both counsel for the accused and the judge advocate in their closing argument to the court. However, great care should be taken by both in regard to the authenticity of their statements and especially is this so with regard to the judge advocate. He should be careful not to make any misstatements of law or fact, because of his advisory status to the court and his duty to safeguard the ends of justice. (C. M. O. 321, 1919, 12; file 26262–6893, J. A. G., 7 Nov., 1919.)
3. **Judge Advocate should make argument**—Where the circumstances require, the department has held that his failure so to do under those circumstances is censurable, and in direct conflict with the spirit and intent of Navy Regulations, 1913, R–749 (2). (C. M. O. 25, 1916, 3.)
4. **Objections to the admission of evidence**—Argument on, should not be set forth in record. (C. M. O. 87, 1917, 3.)
5. **Of counsel**—Should not be confused with statement of accused. *See* COUNSEL.
6. **Same**—Should be restricted to matters brought out in evidence. The court should confine the arguments of counsel to the facts adduced in the case. While it is true that a reasonable latitude should be allowed counsel in his closing argument, such argument should not be made a vehicle of evidence nor embrace averments of material facts which, if properly introduced, would be evidence. (File 26262–4993, G. C. M. Rec. No. 39891; C. M. O. 129, 1918, 21.)

ARMY.

1. **Law of courts-martial not always applicable by analogy to naval courts-martial.** *See* NAVY.
2. **Previous service in, does not count for Fleet Naval Reserve.** *See* FLEET NAVAL RESERVE.
3. **Officers**—Are not "superior officers" of members of naval service. *See* "SUPERIOR OFFICER."

ARRAIGNMENT.

1. **Error in—as to branch of service of accused not fatal**—Where an accused was arraigned as fireman, third class, U. S. Navy, instead of fireman third class, U. S. Naval Reserve Force (the branch of service to which he belonged) it was held that the error was not of an invalidating nature. (File 26251-20421, G. C. M. Rec. No. 43726; C. M. O. 153, 1919, 29.)
2. **Failure to arraign on charge**—Does not constitute fatal error. An accused was arraigned on the specification of the single charge against him and pleaded "not guilty," but he was not arraigned on the charge. The record, however, shows that the accused was furnished a copy of the charge and specification preferred against him and that the charge and specification was read to him prior to his arraignment on the specification. The department has heretofore held that failure to arraign an accused on the charge is a fatal error, necessitating disapproval of the proceedings, findings and sentence (G. C. M. Rec. No. 39124 and 40016; C. M. O. 28, 1902; C. M. O. 57, 1905; and C. M. O. 27, 1913, 10–11). These rulings, however, were based upon naval court-martial precedents and the decision of the Supreme Court of the United States in Crain *v.* United States (162 U. S. 625), which decision was overruled by the Supreme Court in Garland *v.* State of Washington (232 U. S. 642).

   Following said later case, it was held that failure to arraign the accused on the charge was not a fatal error, although irregular and contrary to the practice of naval courts-martial established by regulations and long-continued usage. (Naval Courts and Boards, 1917, p. 197; File 26262-5602, G. C. M. Rec. No. 41419; *see also* G. C. M. Rec. Nos. 34302, 34303, 34304, and 35169.) (C. M. O. 39, 1919, 15.)
3. **Rating of accused**—Failure to arraign and find under correct rating does not invalidate proceedings, findings, and sentence. An accused with the rating of mess attendant third class was improperly arraigned by the judge advocate as mess attendant second class; his true rating was not established by any of the witnesses called, and in the findings of the court he was designated as simply mess attendant. It was held, however, that the proceedings, findings, and sentence of the court were not invalidated by the above-mentioned irregularities. (File 26262-5780, G. C. M. Rec. No. 41782; C. M. O. 39, 1919, 18.)

ARREST.

1. **And acquittal by civil authorities**—Not defense to absence over leave. *See* ABSENCE FROM STATION AND DUTY AFTER LEAVE HAD EXPIRED. (C. M. O. 321, 1919, 11.)
2. **Authority of armed guard at radio station**—It is lawful for an armed guard on duty at a naval radio station to arrest one who unlawfully photographs a naval radio station but does not enter upon such reservation, such arrest being made in order that the offender may not escape capture. An offender, so arrested, should be turned over to the Federal civil authorities (United States marshal or his representative) for further action by them. It would not only be entirely lawful but part of the duty of him who makes such arrest to take possession of the photograph film, camera, and other things which are evidence of the commission of the offense and to turn them over with the prisoner to the civil authorities aforesaid. This course is not only just as lawful but it is equally as necessary as it is for one arresting a burglar to seize the tools which are peculiarly the implements of his trade. In the performance of his duty, it is proper and lawful for the guard making the arrest to use so much force, and no more, as may be necessary to accomplish the duty to be performed. (File 12479-1000, J. A. G., 13 Sept., 1917.) (C. M. O. 58, 1917, 11.)
3. **Civilians**—Naval authorities are not authorized to arrest civilians outside naval reservations, but the arrest should be made by the civil authorities. (File 29163-2, Sec. Navy, 24 Feb., 1920.) (C. M. O. 48, 1920, 9.)

4. **Same**—"It is not competent for mere military officers in such case (arresting civilians for crimes committed on reservation) to apply imprisonment by way of punishment; but it is their duty to apply it, if necessary, to prevent bloodshed, and to restore peace, and,to keep the offender to answer over to a competent tribunal." (U. S. *v.* Travers, 28 Fed. Cas. No. 16, p. 537.) (File 29163–2, Sec. Nav., 24 Feb., 1920.) (C. M. O. 48, 1920, 9.)
5. **Same**—Civilians violating the prohibition laws outside naval reservations but within the prescribed zones—facts, should be reported to the United States commissioner of that district, or to the United States marshal, and a warrant obtained which should be served by the United States marshal or some one legally deputized to act for him. (File 29163–2, Sec. Nav., 24 Feb., 1920; C. M. O. 48, 1920, 10.)
6. **Civilians by naval authorities**—Civilians arrested on naval reservation by naval authorities for felonies and misdemeanors should be retained in custody no longer than is necessary to turn them over to proper civil authorities of the United States. (File 29163–2, Sec. Navy, 24 Feb., 1920; C. M. O. 48, 1920, 9.)
7. **Same**—Civilians may be arrested by naval authorities on naval reservations for felonies or misdemeanors committed on said reservations. (File 29163–2, Sec. Navy, 24 Feb., 1920; C. M. O. 48, 1920, 9.)
8. **Prisoner at large is person under.** (File 26251–17529, G. C. M. Rec. No. 39574; C. M. O. 114, 1918, 28.)
9. **Under; awaiting trial**—Manual of Naval Prisons not applicable to personnel of the Navy in the status of being. It is not the intention of the department that the provisions of the Manual for the Government of the United States Naval Prisons should be applied generally to members of the naval personnel held under arrest awaiting trial. These individuals are not in the status of men who have been regularly tried, convicted, and sentenced by a duly constituted court-martial, but are presumed to be innocent of the offense charged until found guilty by such a tribunal. They are placed under arrest either to insure their presence at the trial or to give them a reasonable opportunity to prepare their defense, and, in general, they should not be placed under arrest until immediately prior to the trial, except in those cases where it is advisable to take extraordinary precautions against their escape, to relieve them from all other duties, so that they may have ample opportunity for preparing their defense, or, owing to the nature of the crime of which they are accused and the character or condition of the individual under arrest, confinement is necessary in the interests of good order and discipline. It is apparent that each individual case must be judged on its merits and the confinement should be no more rigorous than the circumstances require.

   "Communications between an accused under arrest and awaiting trial and his counsel are privileged and not subject to any interference on the part of those in charge of his detention.

   "The restrictions contained in articles 63, 64, and 172, Manual for the Government of United States Naval Prisons are not to be considered as applying to an individual awaiting trial except in so far as may be necessary to prevent him from obtaining such articles as may be prohibited to those under arrest."

   In accordance with the above views, the Secretary of the Navy directed that a member of the naval personnel held awaiting trial by general court-martial be given every opportunity consistent with his safe detention to communicate with his counsel and perpare his defense. (File 26251–20990:4; Sec. Navy, 25 Aug., 1919; C. M. O. 268, 1919, 10.)
10. **What constitutes**—Except in the case of a submission, there must be either a physical touching or restraint, mere words addressed to the person not being sufficient. Such words are enough, however, if there is also submission to one who has the apparent power of carrying his design into effect. (C. M. O. 27, 1919; G. C. M. Rec. No. 41111.)

ARTICLES FOR THE GOVERNMENT OF THE NAVY.

1. **Article 14, Section 7, construed.** *See* CHARGES AND SPECIFICATIONS.
2. **Article 60 construed.** *See* EVIDENCE, DOCUMENTARY.

"AS AN ENTIRELY SEPARATE PROCEEDING."

1. **Letter of reprimand**—The officer having been sentenced to dismissal and the sentence having been remitted on unanimous recommendation for clemency. (G. C. M. Rec. No. 46013; C. M. O. 55, 1920.)

ASIATICS.

1. **Naturalized, are entitled to citizenship pay**—"* * * In view of the decision of this office, dated February 21, 1912 (18 Comp. Dec. 618 and decisions cited therein), that where an enlisted man became naturalized under regular procedure and by a duly authorized court during his second or subsequent term of enlistment, he is entitled to the additional pay provided by General Order 34 from the date of said naturalization. (File 7657-881:8, J. A. G., 13 Oct., 1919; C. M. O. 304, 1919, 13.)

ASSAULT.

1. **As affected by justifiable cause.** *See* JUSTIFIABLE CAUSE.

ASSIGNMENT OF CLAIMS AGAINST THE UNITED STATES.

1. **Is not ipso facto an offense**—The law provides that they are void, except under specified conditions (sec. 3477, R. S.) and in certain cases. (C. M. O. 4, 1916, 3.)

ATTEMPT TO ASSAULT.

1. **No such offense as**—An accused in a recent case was charged with "Attempting to assault a superior officer while in the execution of the duties of his office." Despite the fact that article 4 (3) of the Articles for the Government of the Navy purports to punish for attempting to assault a superior officer while in the execution of the duties of his office, and that members of the naval service have been tried and convicted on such a charge (C. M. O. 1, of 6 Jan., 1893; and No. 60, of 23 Aug., 1904) the Judge Advocate General was of the opinion that there is no such offense, either at common law or created by statutes, and that it is manifestly improper to bring a person in the naval service to trial on such a charge. A simple assault is "an attempt, or offer, with force and violence, to do a corporeal hurt to another." (Clark's Criminal Law, 224; United States *v.* Hand, 26 Fed. Cas. No. 15297.) "An assault is any attempt or offer, with force or violence, to do a corporeal hurt to another, whether from malice or wantonness, under such circumstances as denote, at the time, an intention to do it, coupled with the present ability to carry such intention into effect." (3 Cyc. 1020; C. M. O. No. 10, 1912, p. 6.)

Simple assaults are crimes at common law and by statute, and punishable under the Articles for the Government of the Navy, but an attempted assault is impossible to conceive. If an assault is consummated, it becomes a battery, and according to the naval court-martial practice would be charged as "Assaulting and striking his superior officer while in the execution of the duties of his office" (art. 4, A. G. N.) or "Assaulting and striking another person in the naval service" or "Assault and battery" (art. 8, A. G. N.). A simple assault, however, is in itself nothing more than an attempt or threat to strike or otherwise with force or violence do corporeal hurt to another person. As stated by Clark and Marshall in their treatise on the Law of Crimes, section 120 (D), "There can be no such thing as an attempt to attempt a crime. Since a simple assault, as we shall see, is nothing more than an attempt to commit a battery, and aggravated assaults are nothing more than attempts to commit murder, rape, robbery, etc., there can be no such thing as an attempt to commit an assault, whether simple or aggravated." (State *v.* Sales, 2 Nev. 268 Wilson *v.* State, 53 Ga. 205; People *v.* Thomas, 63 Cal. 302; White *v.* State, 22 Tex.; 608; *See also* Clark and Marshall, Law of Crimes, sec. 200.)

The department therefore disapproved the proceedings, and findings of the court on the above-mentioned charges. (File 26262-5546, G. C. M. Rec. No. 41261; C. M. O. 190, 1918, 16.)

ATTEMPTED SUICIDE.

1. **Enlisted man**—Tried by general court-martial under the charge of "Scandalous conduct tending to the destruction of good morals." (C. M. O. 9, 1916, 2.)

ATTEMPTING TO SUBORN TESTIMONY TO BE GIVEN BEFORE A COURT OF INQUIRY.

1. **Charge not authorized**—Although the offense of "Attempting to suborn testimony to be given before a court-martial" is specified in the limitations of punishments under article 22 (Naval Courts and Boards, 1917, p. 223) no specific provision is made in the Articles for the Government of the Navy, or the regulations thereunder, for "attempting to suborn testimony to be given before a court of inquiry" which is set forth in Charge III. Under such circumstances, the convening authority in preparing charges should be governed by section 67, Naval Courts and Boards, 1917, which provides that "when an offense is a neglect or disorder not specially provided for it shall be charged as 'Scandalous conduct tending to the destruction of good morals' or 'Conduct to the prejudice of good order and discipline.' " (C. M. O. 73 1919; G. C. M. Rec. No. 41748.)

"ATTEMPTS."

1. **To commit crime**—The mere allegation of the attempt is not sufficient. The specification must allege acts constituting the attempt. It must also allege the attempt to commit the offense. In the case of Hogan *v.* State (50 Fla. 86), the court held that indictments for attempts to commit a crime must aver the intent and the overt act constituting the attempt. Again, in State *v.* Burris (Del. 97, art. 427), the court held that an information under a statute relating to attempt to commit offenses, which contains no description of the act done or step taken beyond mere preparation of the accused in attempting to commit the particular crime, is insufficient. (File 26262–7558, J. A. G., 28 June, 1920.) (C. M. O. 85, 1920, 12.)

ATTORNEY GENERAL.

1. **An opinion addressed jointly to the Secretary of the Navy and the Secretary of the Interior on the subject of their respective jurisdiction concerning the question of pensions.** (C. M. O. 37, 1918, 20.)

AVIATION.

1. **Line of duty**—While the department could not undertake to determine in advance whether its decision in the case of an officer accidentally killed or disabled while undergoing instruction in aviation would or would not be in line of duty, it holds that an officer undergoing instruction in aviation in accordance with permission or orders from proper authority is in a duty status and rendering service to the Navy in all respects the same as any other duty which is performed by an officer with permission or under orders from proper authority. (File 28569–5; Sec. Nav., Nov. 23, 1916; C. M. O. 41, 1916, 6.)

AVIATORS.

1. **Naval or student**—Designation as naval or student aviator is effective from the date it is issued by the commanding officer of a naval air station or such other officer as is authorized to issue such designation, and upon approval by the Bureau of Navigation entitles the officer to the benefits conferred upon officers receiving such designation, from the date it was issued by the commanding officer. (File 26254–2215:67, Sec. Nav., 3 Mar., 1920; *see also* File No. 26254–2215:45, of 14 May, 1919.) (C. M. O. 60, 1920, 22.)

BAD CONDUCT DISCHARGE.

1. **Conditional remission**—A sentence to a bad conduct discharge by a summary court-martial was remitted on condition that the accused maintain a record satisfactory to his commanding officer for a period of six months. At the expiration of the six months, in the absence of any action on the part of the commanding officer indicating the revocation of the remission, it becomes final. (File 26838–357, J. A. G., 20 Oct., 1917; C. M. O. 67, 1917, 15.)
2. **Effect of subsequent exemplary conduct**—Exemplary conduct subsequent to bad conduct discharge from the naval service does not operate to expunge from the record the fact that it was awarded, and that fact would still appear of record in the files of the department. (File 7656–1115, 2 Nov., 1920.) (C. M. O. 151, 1920, 16.)
3. **Exercise of mitigating power in case of approval of.** (C. M. O. 11, 1921, 19.)
4. **Pension based on subsequent good conduct.** *See* PENSION.

BANDITRY.

1. **Accused irregularly charged with**—"Banditry" is not an offense specifically known to naval law, nor does the term as such seem to have been defined and prescribed by the laws of war or orders of the military authorities as a specific offense. (File 16870–47:289, J. A. G., 24 July, 1919.) (C. M. O. 237, 1919, 13.)

BAR, PLEA IN. *See* JEOPARDY, FORMER; PLEA IN BAR.

BATTLE.

1. **Eminent and conspicuous conduct in.** *See* ADVANCEMENT IN RANK.
2. **Unbecoming conduct in, absolved from.** *See* ACQUITTAL.

BENEFICIARIES.

1. **Class A beneficiaries of family allowance.** *See* FAMILY ALLOWANCE.

BIAS.

1. **Such evidence may be shown.** *See* EVIDENCE.

BOARDS.

1. **Effect of change of status of member on legality of proceedings.** *See* RECORD OF PROCEEDINGS.

BOARDS, EXAMINING. *See* MARINE EXAMINING BOARDS; NAVAL EXAMINING BOARDS.

BOARDS, EXAMINING, RETIRING, ETC.

1. **Authority to appoint**—No authority is vested in any commander-in-chief, senior officer present afloat, or commanding officer, to appoint naval examining boards, boards of medical examiners, naval retiring boards, or marine examining and retiring boards, except on foreign station as provided by the act of 4 March, 1917, upon authority granted by the Secretary of the Navy. (C. M. O. 77, 1919, 14.)

BOARDS OF INVESTIGATION.

1. **"One officer" boards of investigation**—Example *see* Board of Investigation, Rec. No. 6663, cf, Naval Courts and Boards, 1917, sec. 584.
2. **Proceedings as evidence.** *See* EVIDENCE, DOCUMENTARY.
3. **Right of party affected thereby to be furnished with findings**—An officer of the Navy requested that he be furnished the result of a certain investigation ordered by the Secretary of the Navy to inquire into the condition of a ship's engineer department which had been under his charge, in order that he might "meet any reflection or insinuation that may have been directed toward the period during which the department was" under his charge. He was informed of the time and place of the meeting of the board; that the record was voluminous; that, prior to the investgation, unfavorable entry had been made on his record, to which he had replied by letter; that one of the causes given by the board for the condition of the department in question was the inexperience of said officer; that, in view of the unfavorable entry referred to, the Secretary of the Navy, in his action on the record, directed that no further disciplinary action would be taken; and that, therefore, it was not considered necessary to furnish him with information further than that set forth above. (File 26283-1480:3, Sec. Nav., 25 May, 1918.) (C. M. O. 50, 1918, 19.)

BOARDS OF SELECTION.

1. **Reexamination after selection for promotion by**—The question presented for consideration was whether or not an officer who had been examined professionally and physically prior to being selected by the board of selection for promotion must be reexamined after such selection. Citing a former ruling of the department (File 26260-3630:2) that the act of 29 August, 1916, "requires that an officer of the designated grades before being eligible for examination be first selected by a board and approved by the President" the Judge Advocate General was of the opinion that said ruling is conclusive and that the query must be answered in the affirmative. (File 26521-337, J. A. G., 23 June, 1919: C. M. O. 209, 1919, 20.)

BOY SCOUTS OF AMERICA.

1. **Uniform**—Not prohibited by law from wearing, similar to that of Army, Navy, or Marine Corps. (C. M. O. 46, 1916, 6.)

BREAKING ARREST.

1. C. M. O. 1 (14), C. M. O. 4 (10), and C. M. O. 11 (11), 1921, overruled by C. M. O. 2, 1922.
2. **Breaking restriction will not support such a charge**—An accused was charged with breaking arrest, the specification alleging that he, having been restricted to his ship for a period of 10 days by the lawful order of his commanding officer, did break his arrest and leave said ship. *Held*, that the specification could not support the charge of breaking arrest. Before the charge of breaking arrest can be proved, it must appear that the accuted was actually placed under arrest. (Naval Digest, 1916, pp. 54, p. 9.) The accused in this case was not placed under arrest, but, on the contrary, was merely restricted to his ship. (C. M. O. 25, 1918, 2.)
3. **Documentary evidence.** (C. M. O. 11, 1921, 11.) But see C. M. O. 2, 1922.
4. **Evidence to sustain such charge must show accused knew of his status of arrest.** (C. M. O. 1, 1921, 14.) But see C. M. O. 2, 1922.
5. **Evidence necessary to sustain charge of.** (C. M. O. 4, 1921, 10.)
6. **What constitutes**—The accused in a recent case was found guilty of "Resisting arrest" and "Breaking arrest." Arrest contemplates the following three essentials—authority, intention, and restraint. It is well settled that there must be an intention to arrest and that such intention must be understood by the person arrested. It nowhere appeared in the record of the case that the accused was notified that he was under arrest; in fact, the witnesses for the prosecution expressly stated that no such notification was given. The foregoing, coupled with the additional fact that the accused was lawfully on liberty at the time of the supposed arrest, raised at least a reasonable doubt as to his guilt. (*See* C. M. O. 7, 1911, 11-12, File 26262-1065.) In view of the foregoing, the proceedings, findings, and sentence of court were disapproved by the department. (File 26251-18096, G. C. M. Rec. No. 40752.) (C. M. O. 190, 1918, 15.)

BREAKWATER.

1. **Misinformation about, contained in U. S. Coast and Geodetic Survey charts was the basis of recommendation for clemency.** (C. M. O. 31, 1916.)

BRIGADE.

1. **Commander**—Power to convene deck and summary courts. *See* CONVENING AUTHORITY.

BURGLARY.

1. **Not a crime of less degree than robbery**—Burglary is not a crime of less degree than robbery; it is not included in the crime of robbery, but is an altogether separate and distinct crime. Burglary at common law is the breaking and entering of the dwelling house of another in the night time with intent to commit a felony therein. (Clark's Criminal Law, p. 261. *See* File 26262-4430, G. C. M. Rec. No. 38393; C. M. O. 71, 1918.)

CATCH-ALL CLAUSE.

1. When an offense is a neglect or disorder specifically provided for, it is properly chargeable under the specific charge, and not under the general or catch-all clause. (Art. 22 A. G. N.; C. M. O. 49, 1915, 18; C. M. O. 45, 1916, 2.)

CENSURE.

1. **Judge advocate**—Failure to make arguments. *See* ARGUMENTS.

CERTIFIED COPY.

1. **An interpretation**—When an officer certifies over his signature that a document is a true copy of some other writing, it should be an exact copy of the writing in question, and not a summary of the substance thereof. (Naval Digest. 1916, "Certified copies"; File 26262-3763, J. A. G., 4 Jan., 1918; C. M. O. 4, 1918, 16.)

CHALLENGE.

1. *See* MEMBERS OF COURT.
2. Counsel for an accused challenged a member of the court on the ground that he had formed an opinion as to several material points at issue. Challenged member was examined on his voir dire and admitted that he had formed an opinion prejudicial to the accused. The Judge Advocate General was of the opinion that the court erred in not sustaining the challenge under the circumstances as set out. (File 26262-6318, J. A. G., 9 May, 1919; C. M. O. 186, 1919, 23.)
3. **Improper disallowance of challenge for opinion formed, ground to base petition for new trial**—Counsel for accused objected to each and every member of the court-martial on the ground that "a similar case having been tried, said member had unconsciously formed an opinion; and regardless of what the finding was, said member will be influenced thereby in this case, as the charge and specification are identical." One member replied that he had formed an opinion from the preceding trial, but that he could try the case impartially; two other members did not desire to make reply; the remaining members replied, in substance, that they had formed no opinion and could give the accused a fair and impartial trial. The court refused to sustain the respective challenges of the accused, except in the case of the member who stated that he had formed an opinion.

   In view of the challenges as aforesaid and the reasons advanced in support of said challenges, the department advised the accused that the question of a new trial in his case would be considered if he made formal petition therefor. (C. M. O. 151, 1919; G. C. M. Rec. No. 42088.)
4. **Member of court-martial**—Had investigated charges out of which the court-martial grew. Sustained. (G. C. M. Rec. No. 13370, p. 2.)
5. **Self-challenge**—A member may challenge himself.
6. **Valid challenge of member of court-martial.** *See* MEMBER OF COURT-MARTIAL.

CHANGE OF PLEA OF ACCUSED BY COURT.

1. **Improper procedure upon, sufficient to invalidate.** (C. M. O. 92, 1918, 14; G. C. M. Rec. No. 38716.)

CHAPLAIN, ACTING.

1. **Ration**—Acting chaplains in the Navy are not entitled to rations, or commutation thereof. (File 26254-2333, J. A. G., July 23, 1917; C. M. O. 46, 1917, 20.)

CHAPLAINS.

1. **Temporary acting**—On passing required examination for permanent service, will be transferred to the grade of acting chaplains, and they must fulfill the conditions prescribed by the act of 30 June, 1914. But time served as temporary acting chaplains could be counted in determining their qualifications for appointment in the grade of chaplain. (File 15721-20, J. A. G., 20 July, 1920; C. M. O. 101, 1920, 18.)

CHAPLAINS AND ACTING CHAPLAINS.

1. **Advancement in rank, and length of service requirement**—An interpretation of the act of 4 June, 1920. (File 29226–7, 30 Aug., 1920; C. M. O. 115, 1920, 14.)

CHAPLAINS, TEMPORARY.

1. **Eligibility of, for permanent appointment.** C. M. O. 8, 1921, 16.

CHARACTER.

1. **Given in discharge**—Can not be changed later, in the absence of a mistake of law or fact. (File 7657–885: J. A. G., 21 June, 1920.) (C. M. O. 85, 1920, 13.)

CHARGE.

1. **As laid, not one of those authorized by Naval Courts and Boards, 1917**—An accused was charged with "Violation of a lawful order issued by the commandant * * * naval district." This charge is not one of those authorized by Naval Courts and Boards, 1917. The offense should have been laid under the charge of "Conduct to the prejudice of good order and discipline" or "Disobeying the lawful order of his superior officer." (File 26262–6394, J. A. G., 3 May, 1919.) (C. M. O. 186, 1919.)
2. **Absence without leave while prisoner at large, improper**—The charge "Absence without leave while prisoner at large" is not one of those authorized by Naval Courts and Boards, 1917. Where such a charge was used, however, the department held that it was not of an invalidating nature. (File 26262–6079, G. C. M. Rec. No. 42637; C. M. O. 114, 1919, 14.)
3. **Improper**—"Using abusive, obscene, and threatening language and gestures toward his superior officer" is not an authorized charge, the language of the law being "Who * * * quarrels with, strikes, or assaults or uses provoking or reproachful words, gestures, or menaces toward, any person in the Navy" (art. 8 (3) A. G. N.). The form of charge under this article is "Using provoking and reproachful words, gestures and menaces toward another person in the Navy." (Naval Courts and Boards, 1917, 130.) In addition, the following form charges are given in Naval Courts and Boards, 1917 (pp. 129, 130), apparently laid under article 22, Articles for the Government of the Navy: "Using abusive and profane language toward his superior officer," "Using abusive, profane and threatening language toward his superior officer," "Using abusive and threatening language toward his superior officer," and "Using threatening language toward his superior officer." In this case, it will be seen that the charge has been extended to include something more than is authorized either by law or instructions, and apparently resulted from an attempt to combine two charges in one. (C. M. O. 208, 1919, 5; G. C. M. Rec. No. 42618.)
4. **Irregularly drawn.** (C. M. O. 12, 1921, 6.)
5. **Unauthorized.** (C. M. O. 7, 1921, 11.)

CHARGES AND SPECIFICATIONS.

1. **Allegation of fraud**—It is well settled in most jurisdictions that an intent to deceive (or, as commonly expressed, a fraudulent intent) is an essential element of every actionable fraud, and that to support an action of deceit the existence of this intent must in some way be manifest (Cyclopedia of Law and Procedure, vol. 22, p. 13). Article 14, section 7, of the Articles for the Government of the Navy recites, "Who, being authorized to make or deliver any paper certifying the receipt of any money or other property of the United States, furnished or intended for the naval service thereof, makes or delivers to any person, such writings, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States * * *." It is apparent from the foregoing that intent to defraud is the gravamen of the offense. Without it, no criminality is attached, and such being the case, it should be so set forth in the specification. Without this essential ingredient, the specification is fatally defective. (File 26262–33281, Sec. Nav., 3 Oct., 1917; C. M. O. 67, 1917, 14.)
2. **Allegation of sedition**—Seditious words necessarily mean words of a seditious character. A specification should include an allegation to the effect that the words were knowingly uttered and with seditious intent, i. e., intent to incite insurrection, promote discontent, or disturb the tranquillity, or that they were uttered with intent to produce contempt against a sovereign or government. A low, obscene or idle expression without any intent to either vilify the United States or to promote insurrection therein, or in any way impair the exercise of governmental functions, would not be regarded as seditious. (File 26262–3739, J. A. G., 5 Jan., 1918; C. M. O. 4, 1918, 16.)
3. **Alleging contraction of venereal disease.** *See* VENEREAL DISEASE.

4. **"Assaulting and striking his superior officer" is legal charge**—Counsel for accused in a recent case objected. "There is no such crime as striking his superior officer known under the Articles for the Government of the Navy, the Regulations, nor in the Instructions," and that "section 3, article 4, Articles for the Government of the Navy, required before an offense is committed thereunder that there be two distinct facts present—first, that he strikes his superior officer; second, that his superior officer was at that time in the execution of the duties of his office. The charge as laid under which the prosecution is proceeding is "Assaulting his superior officer" with no allegation that that superior officer was at the time engaged in the performance of the duties of his office."

   The judge advocate replied that the charge was good under article 22, A. G. N., and appeared to be sanctioned by Naval Courts and Boards, 1917, for the reason that such a charge is set forth on page 86 therein. He, however, expressed doubt as to the validity of the specimen charge in view of the provisions of section 67, Naval Courts and Boards, 1917. The court sustained the objection of the counsel for the accused.

   Section 67, Naval Courts and Boards, 1917, reads as follows: "When an offense is a neglect or disorder not specially provided for, it shall be charged as 'Scandalous conduct tending to the destruction of good morals' or 'Conduct to the prejudice of good order and discipline.' But when the offense is one specifically provided for, it is properly chargeable under the specific charge and not under a general charge." *See* section 61.

   The language of section 67 is not to be construed in the narrow sense argued by counsel for the accused in this case and adopted by the court. The words "not specially provided for" and "specially provided for" are not to be limited to offenses specially provided for in the Articles for the Government of the Navy but also include offenses specifically designated in the limitations of punishment and in the specimen charges contained in Naval Courts and Boards, 1917. As the charge was in conformity with the specimen charge on page 86, it was not defective on the ground urged by counsel for the accused and its legality should have been sustained by the court. The objection should have been overruled.

   The above is not to be construed as meaning that a charge not specially provided for either in A. G. N., the limitations of punishment, or the specimen forms in Naval Courts and Boards, 1917, is fatally defective. All offenses committed by persons belonging to the Navy which are not specified in the Articles for the Government of the Navy properly come within the purview of article 22. Section 67 of Naval Courts and Boards, 1917, is an instruction for convening authorities, which is directory, not mandatory, and violation of such section does not invalidate a charge otherwise good under article 22. (File 26262-5215, G. C. M. Rec. No. 40447.) (C. M. O. 190, 1918, 17.)

5. **Charging facts in the disjunctive**—The primary requisite of a specification is that it clearly inform the accused of the exact offense with which he is charged in order that he may properly prepare his defense. (Naval Courts and Boards, 1917, sec. 63; C. M. O. 33, 1914, 6–7; C. M. O. 148, 1918, 3.) A specification charging facts in the disjunctive is bad for uncertainty. Thus it has been held that an indictment is bad for uncertainty which charged that the defendant suffered a game of cards to be played "in a house or on premises in the county aforesaid," or that charged the sale of "spirituous or intoxicating liquor," or the administering of a "drug or poison" or the breaking into a "barn or stable," etc. This rule applies in all cases except where the word "or" is used in the sense of "to wit." (Clark's Criminal Procedure, p. 169, 170, and cases cited.) (C. M. O. 117, 1920, 2; G. C. M. Rec. No. 48689.)
6. **Charge must be one authorized by Articles for the Government of the Navy**—The charge "Violation of a lawful order issued by the commandant * * *" is not an authorized one. (File 26262-5387, G. C. M. Rec. No. 40787; File 26262-5587, G. C. M. Rec. No. 41352; C. M. O. 174, 1918, 16.)
7. **Confusion**—Resulting from preferring two sets of charges and specifications against accussed. (C. M. O. 89, 1919.)
8. **Court inconsistent in its findings.** *See* FINDINGS.
9. **Defect in specification**—When a defect in a specification is impliedly waived by the accused, who, being represented by counsel, made no objection to the specification and submitted to trial, and evidence was adduced such as to supply the deficiency, a conviction thereunder could be legally sustained. (File 26262-5604, G. C. M. Rec. No. 41903; C. M. O. 39, 1919, 16.)

10. **Defective**—Though a charge and specification is defective, nevertheless, if they are definite and inform the accused with certainty of the offense with which he is charged, the irregularity may not prejudice the rights of the accused. (File 26262-7893, 3 Nov., 1920; G. C. M. Rec. No. 50117.) (C. M. O. 133, 1920, 14.)
11. **Same.** C. M. O. 9, 1921, 10.
12. **Same**—Each specification must be complete and in itself support the charge; it is not sufficient that several specifications taken together may support the charge. Any specification which, standing alone, does not support the charge is fatally defective. (C. M. O. 208, 1919, 5.)
13. **Desertion**—Place of desertion is not of substance, but of form, and failure to prove does not vitiate the proceedings, as where desertion was alleged to have taken place at one place and proved to have taken place at another. (File 26251-25544, 5 Nov., 1920; G. C. M. Rec. No. 50211.) (C. M. O. 113, 1920, 13.)
14. **Same, as a continuing offense**—Although there is some authority for considering desertion as a continuing offense, yet, as a matter of policy and without reference to the legal aspect of the question, it is not desired that the offense of desertion be charged as having been committed in time of war unless the absence of the man so charged began after the declaration of war. (G. C. M. Rec. No. 34963.) (C. M. O. 72, 1917, 15.)
15. **Disapproval of one charge and specification thereunder**—For the reason that no one specification supports the charge. (C. M. O. 208, 1919, 6.)
16. **Drunkenness**—Where there are aggravating circumstances connected with the alleged intoxication of accused, such as "While confined to his ship," this offense is properly chargeable as "Conduct to the prejudice of good order and discipline." (C. M. O. 63, 1919.)
17. **Duplication**—Accused charged with "Absence from command without leave" and "Desertion" for same offense. (C. M. O. 185, 1919.)
18. **Same**—of charges. For the same act or omission should be avoided, except when, by reason of lack of definite information as to available evidence, it may be necessary to charge the same act or omission as constituting two or more distinct offenses. (C. M. O. 185, 1919.)
19. **Elements of the offense of perjury.** *See* PERJURY.
20. **Embezzlement of post exchange accounts should be charged as scandalous conduct**—An accused was charged and acquitted of embezzlement. The specification alleged in effect that he failed to keep and account for stores, the property of the post exchange. The offense of embezzlement as laid down in article 14 of the Articles for the Government of the Navy is limited to stores, etc., property of the United States, furnished and intended for the military or naval service thereof. The post exchange funds are not property of the United States (Digest of Opinions, J. A. G. of the Army, 1912, p. 638), nor was it alleged in the specification that the funds embezzled were intended for the military or naval service thereof. As they were not alleged to have been public funds, the offense does not fall within the provisions of the Criminal Code, section 85, et seq. The charge should have been "Scandalous conduct tending to the destruction of good morals," which is provided for under article 8, Articles for the Government of the Navy. The specification as laid does not support the charge and the court therefore erred in pronouncing the charge and specification thereunder in due form and correct. (File 26262-7385, J. A. G., 13 May, 1920; G. C. M. Rec. No. 47621; C. M. O. 76, 1920, 11.) *See* EMBEZZLEMENT.
21. **Elements of the offense of Robbery.** *See* ROBBERY.
22. **Error in charging**—Where accused charged under a general charge with an offense specially provided for by the articles for the Government of the Navy. (Section 1624, R. S.) (C. M. O. 225, 1919, 3.)
23. **Error in first name of accused, if unobjected to, is not a fatal defect.** (C. M. O. 39, 1919, 16.)
24. **Extraneous matter should be avoided.** (C. M. O. 4, 1916, 3.)
25. **Fatally defective.** (C. M. O. 5, 1921, 12.)
26. **Finding on charge.** *See* ACQUITTAL.
27. **Forgery**—Improper to allege that a signature was forged in an indorsement on a Government check for the purpose of obtaining a *claim* against the United States. (G. C. M. Rec. No. 45376; C. M. O. 1, 1920, 2.)
28. **Gist of the offense of perjury.** *See* PERJURY.
29. **Gist of the offense of fraudulent enlistment.** *See* FRAUDULENT ENLISTMENT.

30. **Letter transmitting, may antedate precept**—Although the letter transmitting the charges and specifications to the judge advocate antedates the precept, the irregularity is not such as to invalidate. (File 26262-5187, G. C. M. Rec. No. 40381; File 26262-4808, G. C. M. Rec. No. 39344; *See also* G. C. M. Rec. No. 39225; C. M. O. 141, 1918, 22.)
31. **Middle names**—Christian names, other than the first, may be indicated by initial letters. (Navy Regulations, 1913, R9712 (5); Form of Procedure, 1910, p. 83; Index-Digest, 1914, pp. 3, 28; C. M. O. 36, 1914, 6, 7; C. M. O. 4, 1916, 5.)
32. **Multiciplicity or plurality of charges**—Should be avoided. The department does not approve of trying an accused on two charges where the identical facts are made the basis of both (C. M. O. 5, 1914, 7) and no necessity exists to provide for every possible contingency in the evidence. (C. M. O. 42, 1914, 7; C. M. O. 45, 1916, 2.)
33. **Must allege an offense.** (C. M. O. 4, 1921, 11.)
34. **Navy Regulations erroneously cited**—An officer was charged, inter alia, with failure, as provided by the Navy Regulations, to cause the patent log to be used, or cause soundings to be taken, or proper lookouts to be stationed low in the bow. *Held*, that as the Navy Regulations do not appear to provide that the naviagator, as such this officer was, of a ship shall perform, or provide for the performance of these particular duties, unless ordered so to do by his commanding officer (Article R-2403, Navy Regulations, 1913), the specification was defective. (C. M. O. 22, 1918.)
35. **Neglect of duty**—A specification drawn under the charge of neglect of duty which avers simply that an accused "Having (at a certain time) been regularly posted as a sentinel (on a certain post) did then and there neglect and fail to perform his duty as sentinel on said post" without setting forth the material facts constituting the alleged neglect, is fatally defective. (Naval Courts and Boards, 1917, sec. 62; G. C. M. Rec. No. 35544; C. M. O. 72, 1917, 15.)
36. **Not in due form and technically correct**—Because public statutes and Navy Regulations were quoted therein. As courts-martial will take judicial notice of the foregoing publications, they need not and should not be set out in the allegation. (C. M. O. 4, 1916, 3.)
37. **Offense**—Must allege, cognizable by court-martial. The offense alleged in the specification must support the one set out in the charge. Otherwise they are defective. (C. M. O. 4, 1916, 3.)
38. **Same**—One only in each specification must be alleged. The mere fact that the location of the accused may have changed while intoxicated does not in itself constitute a distinct offense. (C. M. O. 17, 1916, 9.)
39. **Offense must be alleged.** (C. M. O. 8, 1921, 10.)
40. **Perjury**—If based on testimony given at some previous hearing and such testimony is incorporated in the specification, it is essential to set forth the complete question and answer and not an excerpt from the latter. Both, in their entirety, should be alleged so that the whole may be taken together and the complete purport thereof made to appear. If, however, the specification alleges the answer to be set forth in substance or effect, the exact recital is not necessary, but no material fact should be withheld. (File 26262-3795; C. M. O. 4, 1918, 16.)
41. **Plurality.** *See* MULTIPLICITY, above.
42. **Profane and threatening language**—Language averred in specification must be both profane and threatening. (C. M. O. 51, 1919.)
43. **Proper form for the offense of missing ship**—It is proper to charge an accused with *both* "Absence from station and duty without leave" and "conduct to the prejudice of good order and discipline" where the unauthorized absence was with the manifest intention of evading some particular duty (as coaling ship or landing party) or of service on some particular ship (as by missing ship). (G. C. M. Rec. No. 31600; C. M. O. 3, 1916, 7.)
44. **Proved**—Excepting word which forms the gist of the offense renders specification meaningless and does not charge an offense. (C. M. O. 97, 1919.)
45. **Same**—Beyond a reasonable doubt, ground for disapproval of findings and acquittal. (C. M. O. 93, 1919.)
46. **Proof of**—Must be proved beyond a reasonable doubt. (C. M. O. 163, 1919.)
47. **Proof of breaking restriction will not support charge of breaking arrest.** *See* BREAKING ARREST.
48. **Scienter**—In what class of cases scienter should be alleged. (C. M. O. 160, 1919.) *See* SCIENTER.
49. **Specification**—In crime of murder not in due form and techincally correct. (C. M. O. 237, 1919, 15.)

50. **Same**—Insufficient to allege an offense. Was not alleged that act complained of was committed unlawfully or for some wrongful purpose. (C. M. O. 227, 1919.)
51. **Same**—Must allege an offense. (C. M. O. 8, 1919.)
52. **Same**—Should set forth facts constituting the offense. (C. M. O. 10, 1921, 9.)
53. **Same**—Objectionable upon the ground of insufficiency. No objection being made, defect cured by acquittal of accused upon the charge. (C. M. O. 184, 1919, 2.)
54. **Same**—Vague and indefinite in that it failed properly to specify manner and means accused aided and abetted another in commission of offense. (C. M. O. 39, 1919, 16.)
55. **Same**—Under charge of manslaughter did not allege with sufficient definiteness facts which, if true, would show that the homicide was felonious. (C. M. O. 39, 1919, 15.)
56. **Same**—If unobjected to, cured by finding of court. (C. M. O. 39, 1919, 16.)
57. **Stealing and selling Government property**—Are distinct offenses and must be separately charged. (C. M. O. 72, 1917, 15.)
58. **Stealing property of the United States, etc., distinguished**—Article 14 of the Articles for the Government of the Navy, section 8, specifies "Stealing" property of the United States, furnished and intended for the naval service thereof, as a separate and distinct offense from "wrongfully and knowingly selling" same. The preferring, therefore, of a charge of "selling" in conjunction with a charge of "stealing" the same articles of property of the United States does not involve a duplication of charges. (G. C. M. Rec. No. 35291; C. M. O. 72, 1917, 15.)
59. **Surplusage**—Matter not being essential part of the specification may be treated as. (C. M. O. 102, 1919.)
60. **They should be clear and explicit**—The allegation in a specification that the accused did "attempt to commit an immoral act in and upon the body of one" is not a sufficient statement of the material facts or particular acts as would properly describe the offense. *See* Naval Courts and Boards, 1917, secs. 62, 71, and 75. (File 26262–3763, J. A. G., 4 Jan., 1918; C. M. O. 4, 1918, 16.)
61. **Those not specifically provided for.** (C. M. O. 2, 1912, 14.)
62. **Unauthorized charges**—Limitations of punishment being suspended in time of war by President, the use of unauthorized charges does not involve the same fatal consequences as would be the case in time of peace. (C. M. O. 73, 1919.)
63. **Same**—Not sanctioned by the department. (C. M. O. 73, 1919.)
64. **"Unauthorized exit" and "prohibited exit" not equivalent terms**—Where a specification alleges that the accused did, on or about 9.30 p. m., April 1, 1918, leave the barracks at which he was serving through an unauthorized exit, to wit, through a gap in the fence which inclosed said barracks, no offense is charged, as the use of an unauthorized exit is the use of one not affirmatively sanctioned but not necessarily a prohibited one. It was, therefore, held that the specification was fatally defective. (File 26262–4360, J. A. G., 17 May, 1918; G. C. M. Rec. No. 38226; C. M. O. 50, 1918, 17.)
65. **Specification**—Under three charges identical in phraseology, disapproved second and third. (C. M. O. 172, 1919, 2.)
66. **Use of improper appellation of an offense.** *See* BANDITRY. (C. M. O. 237, 1919, 13.)
67. **Venereal diseases**—Approved form of specification to be used in such case. *See* VENEREAL DISEASE.
68. **When an offense is in violation of a local or special order, such local or special order must be set forth in the specification.** (C. M. O. 3, 1921, 13.)
69. **When place is essential to establish the jurisdiction of the court, it must be alleged.** (C. M. O. 3, 1921, 13.)

CHECK.

1. **A Government check is not a claim.** (C. M. O. 1, 1920, 2.)

CHECKAGE.

1. **Against account of straggler, cost of transportation of himself and guard**—An enlisted man, Y, reported at the receiving ship at New York as a straggler from the U. S. S. ———, which ship had in the meantime left New York for Pensacola, Fla. Y was delivered under guard on board the ———, at Pensacola. It was then sought to check against the account of Y the cost of transportation of himself and guard from New York to Pensacola. The department knows of no law or regulation which would authorize the checkage against the pay of Y of the expenses incurred on account of the guard who accompanied him from New York to Pensacola, Fla. It is extremely doubtful whether even the checkage of the cost of his own transportation against his account is authorized under the circumstances of this case. In a decision of the Comptroller of the Treasury, dated 26 March, 1913, it was held that the expenses incurred in returning an enlisted man from the recruiting station, Dal-

las, Tex., where he was delivered as a deserter by the civil authorities to his station at Mare Island, Calif., could not be checked against the pay of the enlisted man. Y surrendered as a straggler to the receiving ship at New York and was accepted by the naval authorities at that place. His further disposition was in the discretion of his commanding officer or the Bureau of Navigation. (*See* art. 3640–3641, Navy Regulations, and par. 182, Annual Circular, Bureau of Navigation, 1 Jan., 1918.) (File 26254–3145, Sec. Nav. 3 Apr., 1920; C. M. O. 74, 1920, 17.)

2. **For loss or damage to public property.** *See* PUBLIC PROPERTY.

CHECKING PAY.

1. **Duty of commanding officers to notify pay officers.** *See* COMMANDING OFFICERS.
2. **The pay of officers and enlisted men is not legally subject to checkage for loss or damage to public property.** (File 26283–1213, Sec. Navy, Mar. 20, 1917; C. M. O. 22, 1917, 7.)
3. **Officers**—There is no authority of law for the checkage of the pay account of an officer for his indebtedness to a wardroom mess. (Naval Digest, 1916, 448; Melvill *v.* U. S. 23 Ct. Cls. 77; C. M. O. 37, 1917, 12.)

CHECKS.

1. **Pay**—Officer erroneously charged with fraud in violation of article 14 of the Articles for the Government of the Navy, for attempting to assign his pay check to a creditor and at the latter's request, both debtor and creditor knowing the assignment to be valueless. (C. M. O. 4, 1916.)

CHIEF CARPENTER.

1. **Eligibility to appointment as assistant naval constructor.** *See* WARRANT OFFICER.

CHIEF OF POLICE OF GUAM.

1. **Sergeant of marines acting as chief of police of Guam, tried by general court-martial for aiding in violating liquor laws which it was his duty to enforce.** (C. M. O. 9, 1916, 6.)

CHIEF PAY CLERKS.

1. **Duty away from paymasters.** *See* PAY CLERKS.

CHIEF PETTY OFFICER.

1. **May be placed in charge of recruiting station**—It is lawful to place a chief gunner' mate in charge of a recruiting station of the Navy to which is attached an assistant surgeon, Medical Reserve Corps, and to hold such chief gunner's mate responsible for all duties outside of the duties of the medical examining officer. (File 11130–45, J. A. G., 7 Sept., 1917; C. M. O. 58, 1917, 11.)
2. **Revocation of permanent appointment not considered as reduction in rating**—(C. M. O. 5, 1921, 16.)

CHIEF PHARMACIST.

1. **Age limit as assistant surgeon**—A chief pharmacist over 50 years of age is ineligible for appointment to the grade of assistant surgeon, under the act of May 22, 1917, which specifically provides: "That in making appointments authorized herein, the maximum age limit shall be 50 years for * * * candidates for assistant surgeon * * *." (File 27213–13, J. A. G., 20 Oct., 1917; C. M. O. 67, 1917, 15.)

CHIEF PHARMACIST'S MATE.

1. **May be temporarily appointed dental surgeon.** *See* DENTAL SURGEON.

CHIEF WARRANT OFFICERS.

1. **Retirement of.** (C. M. O. 4, 1921, 18.)

CIRCUMSTANTIAL EVIDENCE.

1. **Use of, in establishing corpus delicti.** (C. M. O. 12, 1921, 7.)

CITATIONS.

1. **Erroneous**—Where counsel for accused cites dissenting opinion of a court in a case not in point. (C. M. O. 212, 1919, 4.)

CITIZENSHIP.

1. *See also* ALIEN ENEMY.
2. **A Japanese born in Japan of Japanese parents ineligible for**—A Japanese born in Japan of Japanese parents is not eligible for naturalization as a citizen of the United States and a certificate of naturalization issued him by any court of the United States is null and void and does not entitle him to the benefits of citizenship, even though he has served in the Navy of the United States for 19 years. (File 26252–140, J. A. G., 14 Mar., 1919; C. M. O. 114, 1919, 16.)
3. **How affected by dishonorable discharge.** *See* DISHONORABLE DISCHARGE.

4. **Indians and Mongolians not eligible**—A South American Indian and a Japanese recently petitioned the United States District Court for the Southern District of New York to be admitted to citizenship by reason of service in the naval forces of the United States during the present war. The court sustained the contention of the Government that "naturalization is under any circumstances restricted to free white persons, persons of African descent, native-born Filipinos and Porto Ricans" and denied the application of the petition of the petitioners. (Citations, sec. 2169, R. S.; act 6 May, 1882; act 29 June, 1906; sec. 2166, R. S.; act 9 May, 1918; In re Camillo, 6 Fed. 256; Foung Yue Ting *v.* U. S., 149 U. S. 698; In re Alverta, 198 Fed. 688; Bessho *v.* U. S. 178 Fed. 245; In re Buntaro Kumahai, 163 Fed. 922; In re Knight, 171 Fed. 299; C. M. O. 237, 1919, 21.)
5. **Method of procedure to restore rights to citizenship lost by conviction of desertion**—One method to bring about the restoration of the rights of citizenship in such case is to file an application with this department, supported by affidavits of citizens of the applicant's town, preferably his employers, showing that his character and conduct subsequent to his discharge from the Navy have been exemplary. Such application, if submitted, will be forwarded to the Department of Justice with the recommendation of this department regarding the exercise of executive clemency. (File 26282-369, Sec. Nav., 4 Sept., 1919; C. M. O. 280, 1919, 12.)
6. **Naturalization of Filipinos**—Filipinos are eligible for citizenship under decisions rendered by the Supreme Court of the District of Columbia (In re Monico Lopez, Naturalization No. 1345) and by the United States District Court for the Northern District of California (In re Bautista, 245 Fed. 765; Bul. 72, 1917, 16.) However, as was stated by Mr. Justice Gould in the decision first above referred to "in other jurisdictions, an opposite conclusion has been reached" with reference to the naturalization of Filipinos. The act of 30 June, 1914 (38 Stat. 392, 395), provides that any alien with honorable discharge, or ordinary discharge, with recommendation for reenlistment, from the U. S. Navy, Marine Corps, or Coast Guard, may under certain circumstances be "immediately" naturalized upon application made under certain conditions of said act. The Filipino applicant being on the Atlantic coast of the United States, it was suggested as a matter of convenience that he apply to the Supreme Court of the District of Columbia for naturalization. (File 26262-134, J. A. G., 23 April, 1918; C. M. O. 37, 1918, 20.)
7. **Same**—A mestizo, who was born an alien with respect to the United States on the island of Luzon in 1888, served two enlistments in the United States Navy, was discharged honorably in each case and then, while serving under this third enlistment, filed a petition for naturalization in the District Court for the Northern District of California, Southern Division, and was granted citizenship. (*See* File 26252-124:1; C. M. O. 72, 1917, 16.)
8. **Officers of the National Naval Volunteers**—Offices held by officers of the National Naval Volunteers being officers of the Navy within the meaning of Article R-330, (1), Navy Regulations, 1913, before any one may be appointed to an office in the National Naval Volunteers he must not only have declared his intention to become a citizen, but he must in fact be a citizen. (File 3973-184, J. A. G., Mar. 17, 1917; C. M. O. 22, 1917, 9.)
9. **Pay**—Naturalized Asiatic entitled to. (C. M. O. 304, 1919, 12.)
10. **Porto Ricans in naval service.** (C. M. O. 186, 31, 1919.)
11. **Unnaturalized national enlisted in the Navy**—A person who was born in Guam prior to the acquisition of that island by the United States and who has since lived in Guam, the Philippines, and the United States, and who has been enlisted in the U. S. Navy as a mess attendant since 24 October, 1917, does not thereby, and without naturalization, become a citizen of the United States, and is not entitled to the increased pay prescribed by the regulations for mess attendants who are citizens of the United States. (File 26252-135, J. A. G., 21 May, 1918; C. M. O. 50, 1918, 31.)

CIVIL AUTHORITIES.

1. **Authority to make arrest on and divert from its course a Government vessel**—Certain marines accused of having participated in a disturbance on shore between enlisted men of the Marine Corps and police officers, while returning to the station were pursued upon the ferryboat by the police officers. After the boat had left the landing, the pilot was ordered by the police officers to return to the landing, where the marines in question were taken off by the police officers. On the question presented for consideration by the foregoing statement of facts, viz, "Whether or not the civil authorities were within their legal rights in interfering with the movements of the Government ferry and making arrests on board," the views of the department are expressed in the following quoted opinion:

"For the purpose of this case it is not deemed necessary to enter into a minute discussion of the specific terms under which the naval authorities exercise jurisdiction over the Government ferry and landing at Newport. It will be sufficient to state the general principles heretofore announced by the Federal and State courts and the Attorneys General as bearing upon the general issue.

"Article 1, section 8, clause 17, of the Constitution of the United States provides:

"'The Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever over such district (not exceeding 10 miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings.'

"When the title is acquired by purchase by consent of the legislatures of the States and the Federal jurisdiction is exclusive of all State authorities. This follows from the declaration of the Constitution that Congress shall have 'like authority' over such places as it has over the District of Columbia; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of Congress and that no other authority can be exercised over them has been the uniform opinion of Federal and State tribunals and of the Attorneys General. (Fort Leavenworth Railway Co. *v.* Lowe, 114 U. S. 525; United States *v.* Cornell, 25 Fed. Cas. No. 14867; Commonwealth *v.* Clary, 8 Mass. 72; United States *v.* Meagher, 37 Fed. Rep. 875; United States *v.* Penn., 48 id., 669; United States *v.* San Francisco Bridge Co., 68 id. 891.)

"The consent of the legislatures of the States in such cases is usually accompanied by a reservation that civil and criminal process of the State courts may be served in the places purchased. Speaking generally of this reservation, it may be said that it is not considered as interfering in any respect with the supremacy of the United States over such lands, but it is permitted in order to prevent such lands from becoming an asylum for fugitives from justice. (See cases above cited; also United States *v.* Travers, 28 Fed. Cas. No. 16537; United States *v.* Davis, 25 Fed. Cas. No. 14930; United States *v.* Carter, 84 Fed. Rep. 622; United States *v.* Tucker, 122 Fed. Rep. 518; Western Union Telegraph Co. *v.* Chiles, 214 U. S. 274; 6 Op. Atty. Gen. 413; id., 577; 7 id., 628; 20 id., 611; 23 id., 254.)

"In 1857 the Secretary of the Treasury transmitted to the Attorney General a legislative act of the State of Iowa purporting to cede to the United States jurisdiction over and upon all lands purchased by the United States for certain purposes in said State and requested an opinion as to the sufficiency of the said act. Mr. Cushing said, among other things (8 Op. Atty. Gen. 418):

"'It provides that "nothing in this act shall be so construed as to prevent, on such lands * * * the courts of this State from exercising juridsiction of crimes committed thereon." This reservation is distinctly incompatible with the provisions of the penal acts of Congress and would obstruct, if not defeat, the execution of those acts. Moreover, it is inconsistent with any possible construction of that "exclusive" jurisdiction which, according to the letter and the intent of the Constitution, are in such cases to be vested in the United States. It is not sufficient that persons and property on such ceded sites shall be exempt from the legislative authority of the State, in the matter of civil acts performed within or upon such sites. It is still more necessary that the acts performed thereon and alleged to be criminal, shall be saved from the criminal authority of the State.

"'I have advised in all these cases that the United States shall admit that the process of the State, civil or criminal, may be served within such sites, in reference to rights acquired, obligations incurred, or crimes committed, outside of any such cession, but within the territorial limits and under the appropriate constitutional authority of the particular State. It is impossible to go beyond this point and give to the courts of the State, as proposed in this act, jurisdiction of crimes committed on such sites, to the exclusion of, or even in concurrence with the proper jurisdiction of the United States.'

"There is, however, an important qualification upon the rights of States over lands and structures of the United States which is found in the principle of law that no State has a right to interfere with the instrumentalities of the Federal Government. In the foregoing case of Fort Leavenworth Railway Co. *v.* Lowe, speaking of the acquisition of lands by the United States in certain cases, the court said:

"'Where, therefore, lands are acquired in any other way by the United States, within the limits of a State than by purchase with her consent, they will hold the lands subject

to this qualification; that if upon them forts, arsenals, or other public buildings are erected for the uses of the General Government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such intererence and jurisdiction of the States as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the General Government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers.'

"This principle was reiterated, and the foregoing was referred to with approval in the case of the Chicago, Rock Island and Pacific Railway Co. *v.* McGlinn (114 U. S. 542), and it is also one that has been recognized from the earliest days of our Government and is substantially embodied in the cases of McCullough *v.* Maryland (4 Wheat. 316); Osborn *v.* The Bank (9 Wheat. 738); Dobbins *v.* Erie County (16 Pet. 434); and numerous others.

"Therefore in serving such process in a navy yard or other Federal reservation, as the State may have the right to do, such right is impliedly qualified by the above principle that the instrumentalities of the United States must not be interfered with or obstructed. To the end that the above principle should not be violated, it was heretofore considered by the Department that before such process is served, it is proper and necessary that the civil officer, or some one for him, communicate with the commanding officer or commandant, as the case may be, and obtain the sanction of that officer to serve process in his hands. It was not the intention, however, that there should be any friction between the civil and naval authorities in this matter, and therefore the necessary procedure was amply set forth in this department's General Order No. 121, of September 17, 1914.

"In the instant case, the police officers clearly violated the above principle in boarding the Government ferryboat for the purpose of making arrest thereon, without first obtaining the consent of the proper naval authorities, and also in directing the return of the ferryboat to the Government landing after it had proceeded on its trip across the channel. In order that there may be no misunderstanding in this respect in the future, you are advised to inform the local civil authorities that the Navy Department has no desire to obstruct the operation of the State laws by preventing the punishment of persons in the Navy for a violation thereof; and that upon the presentation of lawful process in proper hands the person wanted will, after communication with the department in accordance with the provisions of General Order 121, invariably be delivered to the civil officer, or such officer will be allowed to serve the process himself, whichever course appears the more advisable, provided the case is not one in which, by reason of any Federal interest involved, the United States should intervene." (File 26283-2642, Sec. Nav.; C. M. O. 237, 1919, 18.)

2. **Delivery of naval personnel to**—As to Samoa. General Order 121, of September 17, 1914, does not apply to persons in the naval service at Samoa, and there are no "civil authorities" at Samoa, within the meaning of this general order. (File 26524-125, Sec. Navy, Apr. 1, 1915; C. M. O. 16, 1915, 5.)
3. **Same**—As to Panama. General Order 121, September 17, 1914, does not apply to Panamanian authorities. The department's instructions must be requested in specific cases as they arise, giving particulars. (File 26524-182, Sec. Navy, Sept. 17, 1915; C. M. O. 31, 1915, 6.)
4. **Same**—As to Hawaii. The following instructions were issued to the commandant, naval station, Hawaii, with regard to General Order 121, September 17, 1914: "It is directed that the commandant communicate to the Secretary of the Navy in advance of the delivery of persons to civil authorities only in cases where the circumstances are such as in his judgment make such action desirable. (File 26524-172, Sec. Navy, Nov. 23, 1915; C. M. O. 42, 1915, 10.)
5. **Civil and criminal processes on civilian employees in the Norfolk Navy Yard**—Under the terms of cession and acceptance of jurisdiction over the land deed to the United States by the State of Virginia for the purpose of establishing a navy yard, one of which was to the effect that nothing contained in the act should be construed as to prevent the officers of the State of Virginia from executing any process whatever within the jurisdiction ceded, the commandant of the navy yard at Norfolk, Va., is authorized to permit service of both civil and criminal process on civilians in that navy yard by civil officers of Virginia. (File 5267-1000, J. A. G., Apr. 10, 1920; C. M. O. 74, 1920, 13.)

6. **Delivery of naval personnel to**—In connection with General Order 121, September 17, 1914, in cases arising in the Philippine Islands, the Secretary of the Navy should not be communicated with in advance of the delivery of such persons, unless the circumstances are such as, in the judgment of the commanding officer, make such action desirable. (C. M. O. 9, 1916, 9.)
7. **Delivery of persons in the naval service**—In a state of war and when the welfare of the country demands that its naval personnel render efficient and effective service, it is not deemed in the best interests of the service to deliver persons serving therein to the civil authorities unless there is a reasonable showing that the charges for which such persons are wanted are not trifling or unfounded. Such deliveries will not be made unless the offense charged is a serious one and the charge is shown to be with proper foundation, and further, that the accused will be accorded a fair and speedy trial without prejudice on account of his naval status. Commanding officers will inquire fully into each case before communicating with the Secretary of the Navy for instructions as to the delivery of persons serving under them. The telegraphic report referred to in paragraph 3 of General Order No. 121, of September 17, 1914, should end with the words "delivery recommended" or "delivery not recommended" according to the judgment of the commanding officer sending the dispatch, and should be followed immediately by letters containing a statement of the facts upon which such judgment is based. (File 26524-492, Sec. Navy, Dec. 28, 1917; C. M. O. 88, 1917, 18.)
8. **Naval Medical officers not responsible to civil authorities.** *See* DISEASES.
9. **Parol**—Accused apprehended for desertion while on parol from the civil authorities. *See* JURISDICTION.
10. **Surrender of member of naval service to, upon demand**—In a recent case in which an enlisted man of the Navy was accused of a misdemeanor alleged to have been committed in the State of New Jersey some time prior to his enlistment in the Navy, information was requested as to whether the department would authorize his delivery to the civil authorities of New Jersey upon proper demand, and whether he was liable to arrest for the said offense by the civil authorities of Pennsylvania, in which State he was then stationed, in the event he was granted liberty.

    The department expressed the view that under the provisions of paragraph 14 of General Order No. 121 of 17 September, 1914, the Governor of the State of New Jersey is required to make requisition upon the Secretary of the Navy, showing that the man is charged with an extraditable offense in that State, before his delivery will be authorized by the department.

    In case the man is granted leave of absence and is arrested by the civil authorities of Pennsylvania while away from his station he would have the right to demand extradition proceedings before his removal from the State of Pennsylvania. In case of such arrest by the civil authorities of Pennsylvania, the man should immediately report the facts to his commanding officer who will make demand for his return to the naval authorities, and, in case of refusal of the civil authorities to comply with such demand, will immediately wire a full report thereof to the department in order that proper steps may be taken through the Department of Justice to protect the interests of the Navy if the facts so warrant.

    If a man is delivered to the civil authorities of New Jersey upon requisition of the Governor of the State, as indicated above, his case becomes one for the court to decide as to his guilt or innocence of the offense charged, and the securing of legal assistance at his trial would be a matter of his own concern. In a proper case the department takes action through the Department of Justice to protect persons in the naval service from consequences which may ensue from the performance by them of official duties; but where, as in this case, the offense is not one resulting from the performance of official duties, it is not the policy of the department to take steps to afford legal assistance at the expense of the United States. (File 26524-837, Sec. Navy, 21, Nov. 1919; C. M. O. 304, 1919, 13.)

CIVIL EMPLOYEES.

1. **Leave of absence.** *See* LEAVE OF ABSENCE.

CIVILIANS.

1. **Arrest of**—Civilians may be arrested by naval authorities on naval reservations for felonies or misdemeanors committed on said reservations. (C. M. O. 48, 1920, 9.) *See also* ARREST.
2. **Enlisted men competing with.** *See* ENLISTED MEN.

3. **May be tried by court-martial**—One Charles E. Gerlach, an employee of the United States Shipping Board, went to Europe as a mate of a vessel, apparently in use as a military transport, though this fact was not definitely proved. He was there discharged and sent back to New York on an Army transport. He volunteered to stand watch and did so stand watch for some time, but finally refused so to do. For this disobedience to the order of an Army officer, he was tried by court-martial and sentenced to five years' imprisonment. In a habeas corpus proceedings, the judge held that Gerlach was subject to the Articles of War (R. S. 1342, as amended by the act of 29 Aug., 1916, 39 Stat. 651) and that he was therefore subject to the jurisdiction of a court-martial; that the aforesaid act subjecting him to such jurisdiction was within what was commonly known as the war powers of Congress and is constitutional. (247 Fed. 616; C. M. O. 88, 1917, 15.)

CIVIL RIGHTS.

1. **Of officers, enlisted men, and civilian employees of the U. S. Navy to take part in elections and hold office**—Naval authorities of a foreign nation being interested in the rights of officers, enlisted men, and civilian employees of the U. S. Navy to take part in political activities and elections, and desiring information in regard thereto, forwarded through proper channels the following questions:

"1. Whether or not officers, active and retired, enlisted men, and civil employees of the U. S. Navy have the right to vote and to be elected?

"2. Whether there is a difference in this regard between the election of the President, United States Congress, and State legislative bodies?

"3. What kind of restrictions in regard to voting are provided for officers and men dishonorably discharged and court-martialed for having committed crime?

"4. Whether or not the elections take place on board the ships and in the navy yards?

"5. In case an officer or enlisted man should be elected to a public office or legislative body, what would be his status in the Navy?"

Inviting attention to the fact that the subject under consideration is one which it is difficult to handle in a general way, and that the laws are difficult to apply even when specific cases arise, the Judge Advocate General submitted the following views, with the caution that too much dependence should not be placed on general statements contained therein:

"One phase of the general inquiry may be eliminated at once by the statement that civil employees of the Navy Department are in the same position exactly as other civilians who are citizens of the United States with reference to their right to take part in elections and to hold offices to which they may be elected. Civil employees being eliminated from the question the specific inquiries will be answered in the order in which they occur above; and the answers should be construed as applying only to officers and enlisted men of the U. S. Navy.

"Officers and enlisted men, both active and retired, have the right to vote if they qualify as electors under the laws of the State in which they reside. The qualifications of electors in the United States are prescribed by the legislatures of the various States. The Constitution of the United States provides that 'the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.' (Art. 1, sec. 2, clause 1, Constitution of the United States.)

"Retired officers and enlisted men of the Navy can be elected or appointed to office in the States of the United States or to a Federal office, except in the Territories, and if so elected or appointed can occupy such office subject to the right of the Federal Government to call them to active duty in time of war or national emergency.

"There is no difference between the rights of officers and of enlisted men of the Navy to vote for President and Members of Congress, and to vote for members of the State legislatures, the qualifications of electors for President and Members of Congress being those prescribed by the legislatures of the various States as requisite for electors for the most numerous branch of the State legislature.

"The only loss of civil rights prescribed by law for officers and men dishonorably discharged and court-martialed for having committed crime are contained in the act of 22 August, 1912 (37 Stat. 356), which provides that persons convicted of desertion in time of war shall forfeit their rights of citizenship as well as their right to become citizens. 'And such deserters shall be forever incapable of holding any office of trust or profit under the United States or of exercising any rights of citizenship thereof.' (*See* sec. 1996 of the Revised Statutes.)

"There is no statute or regulation prescribing rules for holding elections on board public vessels or in the navy yards of the United States. Some of the States of the Union have recently enacted laws designed to obtain the vote of qualified voters of the States who are members of the naval service on active duty, but the Federal Government has not by law or regulation prescribed any means of holding such elections. Where the State authorities have requested a poll to be taken on board vessels of the United States the department has complied with such request and permitted the poll to be taken in the manner prescribed by the State laws or election officials.

"Generally speaking, it might be said that officers and enlisted men on active duty are ineligible for election or appointment to public office for the reason that such civil office would ordinarily be inconsistent and incompatible with their duties as naval officers and enlisted men. An officer or man on the retired list, however, could hold a public office, if legally elected thereto, in any State of the Union or any Federal office, except in the Territories. (Sec. 1860, Rev. Stat.)

"To summarize, it might be stated as a general proposition that officers and enlisted men can vote when qualified under State laws and can hold civil office except where such civil office is inconsistent and incompatible with their paramount duties as officers and enlisted men of the Navy, or where such employment or office is prohibited by Federal statute. The statutes restricting the right of officers to hold civil offices are referred to in the following paragraphs:

"Sections 1763, 1764, and 1765 of the Revised Statutes prohibit the payment of additional compensation to retired officers of the Navy for the performance of duty which they might properly be ordered to perform by the Secretary of the Navy. These sections, however, do not forbid the payment of additional compensation for the performance of services having no connection with the officer's official duty and which he could not be ordered by superior authority to perform: or for services rendered under an appointment to a new and distinct office or position, provided that the duties of the two offices or employment are not incompatible. If incompatible he is not entitled to compensation for both but is entitled to the larger of the two. The act of July 31, 1894, modifies the above-mentioned sections of the Revised Statutes and provides that any person who holds an office under the United States at a salary of $2,500 or over per annum shall not hold any other office under the United States to which compensation is attached. It has been held, however, that this provision does not apply to retired officers when elected to public office or when appointed to office by the President by and with the advice and consent of the Senate, or when the additional employment does not constitute an 'office' in the constitutional meaning or legal sense. Under section 1440 of the Revised Statutes if a retired officer accepts an appointment in the diplomatic or consular service of the Government, he shall be considered as having resigned his place in the Navy, and under section 1860 of the Revised Statutes a retired officer is prohibited from holding any civil office to which he might be elected or appointed in any Territory.

"The act of 10 July, 1896, prohibits retired officers from holding employment with any person or company furnishing naval supplies or war material to the Government. This law does not authorize exceptions on any ground." (File 9212–109, J. A. G., 6 Sept., 1919; C. M. O. 280, 1919, 13.)

CIVIL RESPONSIBILITY OF NAVAL OFFICERS.

1. **In matters of lease for rental of quarters**—Information being requested as to whether a naval officer is permitted to break his lease for rental of quarters upon his change of station or assignment to duty, and whether in the event that a judgment is obtained against him in the civil courts, the same may be made the basis of a levy on such officer's salary, the department expressed the view that the matter of holding a naval officer to a lease under such circumstances is one primarily for the consideration of the civil authorities, and further, that aside from the protection afforded by the soldiers' and sailors' relief act of 8 March, 1918, a naval officer is subject to the mandates of civil law in all respects the same as a civilian, and the usual recourse is available for the enforcement of an order of the court against him, the same as if he were not in the naval service. (File 16670–59, Sec. Navy, 29 Aug., 1919; C. M. O. 268, 1919, 12.)

CIVIL SERVICE.

1. **Eligibility of midshipmen for preference in appointment to**—Midshipmen at the Naval Academy are not enlisted in the service but are appointed as midshipmen at the Naval Academy for training. Not being enlisted, they can not be classified as "soldiers, sailors, or marines" within the meaning of the above-mentioned act of July 11, 1919. (File 5252-131; Sec. Nav., Oct. 11, 1919; C. M. O. 296, 1919, 14.)
2. **Positions in**—By members of the Fleet Naval Reserve. *See* FLEET NAVAL RESERVE.

CLASSIFICATION FOR DISRATING.

1. **Table to be used.** (C. M. O. 11, 1921, 12-18.)

CLASSIFICATION OF OFFICERS. *See* OFFICERS.

CLEMENCY.

1. **A recommendation to clemency should not be based on a reasonable doubt of the guilt of the accused**—A court after finding the accused guilty recommends him to the clemency on the the ground that the condition of the accused might have been caused by the whisky given him by a proper representative of the medical department on account of his loss of sleep and run-down condition, and that the accused was guilty of an indiscretion in taking whisky at the time he did, rather than of a wilful offense.

   Held, That the record of the court-martial should show no inconsistency between the finding of the court and the ground upon which its members recommend clemency. A court having found an accused guilty beyond reasonable doubt, its members can not consistently recommend clemency based upon a ground which would tend to subvert the court's finding by raising a doubt as to the guilt of the accused. (C. M. O. 21, 1917, 3.)
2. **Basis of**—"In consideration of long, honorable and faithful service of the accused, and of his exceptionally clean and creditable record * * *." (C. M. O. 45, 1917.)
3. **Same**—"In view of the extenuating circumstances, the previous excellent record of this officer, the recommendation for clemency signed by four of the five members of the court, his mental condition as testified to by the medical officer of the ———, and the fact that he was transferred to the naval hospital for observation and treatment, suffering from psychasthenia, shortly after he was reported for intoxication, it is recommended that the findings of the court be approved, and that the loss of numbers be reduced to three (3)." (C. M. O. 27, 1917.)
4. **Basis of recommendation**—An officer of the Naval Reserve Force was charged with using threatening language toward his superior officer and assaulting and striking his superior officer. Five of the seven members of the court took the following action: "In consideration of the gross and repeated provocation offered to the accused by Lieutenant ———, the very short time the accused has been in the service, and his candid admission of his responsibility for the assault on Lieutenant ———, and with the belief that the accused acted in accordance with the custom prevailing in the merchant service in which he had spent a large portion of his life, and also that he is considered by his superior officers on board the ——— as a competent engineer, we recommend ——— to the clemency of the reviewing authority." (C. M. O. 63, 1918.)
5. **Same**—"In consideration of his inexperience in the naval service, the lack of opportunity afforded the accused to come under the influence of naval custom and the lack of social intercourse involved in duty on a small craft, we recommend ——— to the clemency of the reviewing authority." (C. M. O. 57, 1918.)
6. **Same**—"In view of the urgent need for experienced officers and of the testimony showing him to be reasonably well qualified in military matters, it is considered that the Navy Department might have further use for his services in this war, and for the above reasons alone the accused is recommended for consideration as to the advisability of further using him." (C. M. O. 54, 1918.)
7. **Same**—"In view of the excellent character and performance of duty of the accused as testified to by his commanding officer, the frankness of his manner and testimony before the court, his multitudinous duties, and the volume of confidential papers requiring individual attention which pass through his hands, we recommend ——— to the clemency of the reviewing authority." (C. M. O. 44, 1918.)
8. **Same**—"In view of the fact that the neglect of duty of which the accused is found guilty has been shown to be in the nature of an error of judgment rather than a deliberate neglect, and in view of the testimony of his commanding officer as to his general ability as an engineer, we recommend ——— to the clemency of the reviewing authority." (C. M. O. 43, 1918.)

9. **Basis of recommendation**—"It appears that at the time of the enrollment of the accused he stated that he was qualified for engineering or construction work; that he had practically no experience as a mariner. The accused is evidently fitted for many important construction or engineering assignments, and his services could be used advantageously. In view of the above facts and his patriotism and his willingness to serve his country in time of war, we recommend him to the clemency of the convening authority." (C. M. O. 20, 1918.)
10. **Same**—"In consideration of the fact that the accused is by profession a licensed marine engineer and that the sentence in revision will undoubtedly make it difficult, if not impossible, for him to pursue his habitual means of livelihood, we recommend ——— to the clemency of the reviewing authority." (C. M. O. 14, 1918.)
11. **Same**—"In consideration of the testimony of the officers of the ship as to their belief in his truthfulness and loyalty, we recommend ——— to the clemency of the reviewing authority." (C. M. O. 3, 1918.)
12. **Same**—"In consideration of his short time in the service, his lack of experience in the Navy, and lack of knowledge of naval regulations, and his evident desire to serve the country in time of war, we recommend ——— to the clemency of the reviewing authority." (C. M. O. 2, 1918.)
13. **Same**—"In consideration of the extenuating circumstances shown to exist in connection with the service of the accused on the U. S. S. ———, of the refusal and failure of his commanding officer to forward his application for transfer, of his inexperience in the customs and procedure of the service, his excellent record in both the mercantile and United States services, particularly in the war zone on a United States transport, and finally of the favorable impression produced before the court by the accused, we recommend ——— to the clemency of the reviewing authority." (C. M. O. 33, 1918, 2.)
14. **Same**—"In consideration of the fact that it appears from the evidence as set forth in the testimony that he has already been punished by his commanding officer for the offenses set forth in the charges and specification, by withholding his pay for a period of two months, we recommend ——— to the clemency of the reviewing authorities." (C. M. O. 31, 1918.)
15. **Same**—"In view of the weather conditions on the day on which the U. S. S. ——— was grounded, and the apparently unusual current conditions then existing, which conditions, in our opinion, made it almost impossible accurately to judge the run of the ship and largely contributed to her grounding; and in view of his excellent reputation for careful, conscientious, and painstaking performances of duty, we recommend ——— to the clemency of the reviewing authority." (C. M. O. 27, 1918.)
16. **Same**—"In view of his inexperience in the service and of the need of trained officers in time of war, we recommend ——— to the clemency of the revising authority, and further recommend that the sentence be suspended for a period of one year, depending on his good conduct." (C. M. O. 68, 1917.)
17. **Same**—"In view of the fact that the grounding of the U. S. S. ——— was due to change of course unauthorized by and without the knowledge of the accused, and not to inattention, negligence, or inefficiency, we recommend him to the clemency of the revising authority." (C. M. O. 31, 1917.)
18. **Same**—"In consideration of the short time that he has been in active service, to his training at the Naval Academy regarding measures taken to safeguard confidential publications, and to the fact that no proper place was available to him on board ship to safeguard the Battle Signal Book, we recommend ——— to the clemency of the reviewing authority." (C. M. O. 80, 1917.)
19. **Same**—"In consideration of the fact that the Government suffered no financial loss, and believing the accused to have been the victim of unscrupulous subordinates, we recommend ——— to the clemency of the revising power." (C. M. O. 73, 1917.)
20. **Same**—"In view of the previous excellent record of the accused and of his inexperience, and of the fact that the stranding was due as much to an error in judgment as to negligence and inefficiency, and to the fact that the accused has been under mental suspense for a period of six months, which is in itself considerable punishment, we recommend ——— to the clemency of the revising authority." (C. M. O. 30, 1917.)
21. **Same**—"In view of the extraordinary combination of circumstances on this occasion and the resulting confusion, all of which operated to make this unfortunate incident possible, of the errors on the part of persons other than the accused or those under his command, which contributed to the event, and in consideration of the fact that the offense was the result of zeal rather than lack of initiative, the court unanimously recommends ——— to the clemency of the revising authority." (C.M. O. 86, 1917.)

22. **Basis of recommendation**—"In consideration of the peculiar circumstances of this case, of the fact that the accused has been in the service a very short time, that the error in judgment which caused him to commit the offense of which the court has found him guilty, was, in our opinion, due to his possessing in excess two qualities very desirable in a naval officer, namely, zeal and initiative, we strongly recommend ——— to the clemency of the revising power." (C. M. O. 87, 1917.)
23. **Same**—"In consideration of his long length of service in the United States Navy, his efficiency report, and the fact that in his service of nearly thirty-one years he has never been convicted of any previous offense, we recommend ——— to the clemency of the revising power." (C. M. O. 60, 1917.)
24. **Same**—"In consideration of the exceptionally excellent record of the accused and his professional zeal, as testified to by his brother officers and shown by his reports on fitness; and, as shown by the evidence, his careful preparation for and prudence in the careful navigation of his vessel up to the morning of her stranding, and the impracticability of using, in the navigation of a submarine, all prescribed precautionary methods in the same manner as on other vessels, and the complication of his navigational problem by a dangerous motor accident; and also in consideration of the fact that his working chart and navigational notebook which he desired in his defense had been lost through no fault of his own after they had been surrendered by him to the court of inquiry, we recommend ——— to the clemency of the revising power." (C. M. O. 47, 1917.)
25. **Convening authority**—"Would be inclined to exercise his power of clemency in this instance if it were within his power so to do, and, at the same time, provide for a punishment adequate to the offense found proved." (C. M. O. 25, 1919.)
26. **Same**—Of opinion that the fact that the condition (drunkenness) of accused might in part have been due to his physical condition was not a sufficient basis for the exercise of. (C. M. O. 25, 1919.)
27. **Same**—Comments that due consideration would no doubt be given by higher reviewing authority with greater discretionary powers to said testimony and the recommendation to clemency. (C. M. O. 25, 1919.)
28. **Same**—Added his own recommendation to, because impossible to exercise his power of mitigation and at the same time provide an adequate punishment. (C. M. O. 165, 1919.)
29. **Court**—May not recommend clemency as a body, but such recommendations as are privileged to be spread upon the record are made as by individuals. (C. M. O. 225, 1919.)
30. **Denied**—"In view of the previous excellent record of the accused and of his well known, careful, and painstaking qualities, and to the fact that the stranding was due as much to an error of judgment as to negligence and inefficiency," the members of a court recommended an accused to clemency. The department observed, however, that an officer assigned duty of importance must be held to a strict responsibility for the efficient performance of that duty, and denied the clemency. (C. M. O. 23, 1916.)
31. **Same**—The members of a court-martial recommended an accused to clemency on the following grounds: Domestic difficulties and the fact that the accused had been on a foreign station during the greater part of the period covered by his indebtedness. But the department observed that the accused requested extension of his tour of duty on foreign station in order that he might live more economically and thereby be enabled to discharge his indebtedness and therefore it could not be the basis of clemency. Denied by department. (C. M. O. 15, 1916.)
32. **Same**—Bureau of Navigation felt it could not recommend that clemency be considered. (C. M. O. 217, 1919.)
32. **Same**—Because sentence inadequate for offenses found proved. (C. M. O. 61, 1919.)
33. **Same**—Because so recommended by the Bureau of Navigation. (C. M. O. 19, 1916.)
34. **Same**—Because of the inadequate sentence adjudged. (C. M. O. 10, 1916.)
35. **Same**—Because of lenient sentence adjudged. (C. M. O. 23, 1916.)
36. **Same**—Because of the nature of the offense. (C. M. O. 20, 1916.)
37. **Same**—Fact of long service of accused indicates he must have committed offenses with full knowledge of their serious nature. (C. M. O. 50, 1919.)
38. **Same**—Sentence very mild; to reduce it would not be to the best interests of military discipline. (C. M. O. 152, 1919.)
39. **Same**—Sentence grossly inadequate. (C. M. O. 212, 1919.)
40. **Exercise of, by court-martial.** *See* ADEQUATE SENTENCES.

41. **Granted**—Because of unanimous recommendation of members. (C. M. O. 31, 1916.)
42. **Same**—Without recommendation, because of youth and inexperience, good character and promise, in hope that mild sentence will be sufficient. (C. M. O. 35, 1917.)
43. **Same**—Because accused a young officer of unusual ability and already punished severely. (C. M. O. 47, 1917.)
44. **Recommendation for, based on**—Accused having spent greater portion of his life in merchant service, only short period in naval service, and the lack of experience of officers under his command. (C. M. O. 55, 1920.)
45. **Same**—Previous good record during the long period of his service as an enlisted man, and while a commissioned officer. (C. M. O. 84, 1920.)
46. **Same**—War record. Officer. (C. M. O. 45, 1920.)
47. **Improper for judge advocate to join in recommendation:** It is improper for the judge advocate to join all or any of the members of the court in making a recommendation to clemency. (File 26251–16075, J. A. G., 10 Apr., 1918; G. C. M. Rec. No. 37625: C. M. O. 50, 1918, 18.)
48. **Members of court should make recommendation and not the court as such.** (N. C. & B., 1917, p. 357.)

CLERICAL ERRORS.

1. **Record of proceedings**—If the judge advocate makes a mistake in recording the finding he should rewrite the whole page (C. M. O. 55, 1910, 8) and likewise, if he errs in recording the sentence. (C. M. O. 6, 1916, 3–4.)

CLOTHING AND SMALL STORES.

1. **Issuance**—Under the provisions of Naval Instructions, 1913 (I–1823 (2)), clothing and small stores may be issued to persons in debt to the Government or against whom a checkage is pending, upon written authority of the commanding officer, with a statement upon the requisition that the issue is necessary for the health and comfort of the person requiring it. The issuance of clothing and small stores under the foregoing circumstances is not affected by the cancellation of Articles I–4893 (2) (b), Navy Regulations, 1913, by ALNAV message No. 94. (File 26806–131:54, Sec. Navy, 14 Dec., 1917; C. M. O. 88, 1917, 15.)

COALING SHIP.

1. **Absent without leave.** *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE.

COAST AND GEODETIC SURVEY.

1. **Officers of, may not be enrolled in Naval Reserve Force.** (C. M. O. 7, 1921, 18.)

COAST GUARD.

1. **Death gratuity**—A retired officer in the coast guard on active duty and serving with the Navy in time of war as a member of his organization is not included within the terms of the provision authorizing payment of death gratuity to certain dependent members of the family of persons who die while on the "active list" as a result of perilous service, wounds received, or disease contracted, in the line of duty. (File 28762–197, J. A. G., 23 August, 1917; C. M. O. 53, 1917, 12.)
2. **Desertion defined by the Navy Regulations.** *See* DESERTION.
3. **Enlisted men**—Honorably discharged from the Coast Guard during the period that the Coast Guard served with the Navy, are "sailors" within the meaning of the act of 11 July, 1919. (File 28762–649; J. A. G., 17 Feb., 1920; C. M. O. 48, 1920, 36.)
4. **Promotion of officers**—The act of 16 April, 1908, chapter 145, sections 1 and 3 (35 Stat. 62), authorizes 6 senior captains and 31 captains in the Coast Guard. The requirements of the law would not be satisfied by fixing these numbers at 5 senior captain and 32 captains. Where, therefore, a vacancy occurs in the grade of senior captain and it is desired to suspend the appointment of the ranking captain to fill the vacancy, the situation may not be relieved by promoting the ranking first lieutenant to the grade of captain before an actual vacancy occurs in that grade. (File 28762–277, J. A. G., 10 Dec., 1917; C. M. O. 88, 1917, 15.)
5. **Regulations governing, when operating as part of the Navy**—Inasmuch as the Coast Guard is only temporarily serving with the Navy, it was not the intention of the act of 28 January, 1915 (38 Stat. 800), or the act of August 29, 1916 (39 Stat. 556, 600), to make the Navy laws and regulations applicable to the Coast Guard in all respects and to suspend from operation the laws and regulations under which the Coast Guard normally serves. To examine the laws relating to the Navy and the Coast Guard, and to determine in each instance which is applicable under present conditions would entail unnecessary labor and would consume a great deal of time. It seems that it would be far better to apply the general rules heretofore laid down and whenever a doubtful case arises to determine it upon its own merits. (File 28762–336, J. A. G., 11 Apr., 1918; C. M. O. 37, 1918, 19.)

6. **Status of officers holding temporary appointment in the Navy**—Commissioned and warrant officers of the Coast Guard temporarily appointed commissioned officers in the Navy, do not vacate their commissions in the Coast Guard, but they are held in abeyance until the termination of their temporary appointment, at which time such officers are entitled to revert to the grade or rank in the permanent Navy or Marine Corps, unless in the meantime such officers have become entitled to a higher grade or rank in the permanent Navy or Marine Corps, in which case they shall revert to said higher grade or rank and shall, after passing the prescribed examinations, be commissioned accordingly. The act, however, does not preserve their lineal rank, nor authorize them to revert to a higher rank or grade in the Coast Guard on the termination of their appointment. (File 28762-341, J. A. G., 12 Mar., 1918; C. M. O. 30, 1918, 28.)
7. **Transfer of officers to the Regular Navy; rank and age restrictions**—An interpretation of the act of 4 June, 1920, sections 3, 4, and 5. (File 29226-8, 26 Aug., 1920; C. M. O. 115, 1920, 15.)

COLLISION. *See* CULPABLE NEGLIGENCE AND INEFFICIENCY IN THE PERFORMANCE OF DUTY.

1. **Responsibility of commanding officer**—The Navy Regulations "make the commanding officer responsible that all necessary precautions are taken and he is furthermore chargeable with knowledge of what those precautions are which should be taken under various circumstances; his responsibility for professional knowledge and foresight in avoiding collision applies at all times, but is particularly obligatory in a case similar to this where the ship was in such a position as to invite collision unless unusual care and precautions were employed in making the landing.

"If the court considers that the accident was due to a failure of the engines to back properly, then the fact still remains that the accused is guilty of negligence either in depending entirely on the engines to make the landing safely, or in failing to recognize that other precautions were necessary to insure a safe landing being made." (C. M. O. 19, 1916.)

COMMAND.

1. **By line officers restricted by law to engineering duties**—Can the commanding officer of a squadron, division, or flotilla, specifically authorize a line officer, restricted by law to the performance of engineering duties only, to exercise command or succeed to the command of said squadron, division, flotilla, or ship to which he is assigned, when considered competent for such duty? The foregoing question was submitted for an opinion in view of the language of the last proviso of article R-1003 (6), of the U. S. Navy Regulations, 1913.

A fair interpretation of said article would seem to be that officers restricted by law to the performance of certain duties can not be given other duties by virtue of the above regulations, but that officers whose duties are not restricted by law may be assigned other duties thereunder if the performance of such duties by them is not inconsistent with law. It would therefore be clearly inconsistent with law to authorize a line officer who is restricted by law to the performance of engineering duties only, to exercise military command afloat. (File 20392-1124, J. A. G., 29 May, 1920; C. M. O. 76, 1920, 11.)
2. **By officers of staff corps in line.** C. M. O. 6, 1921, 11.
3. **Hospital ships.** C. M. O. 6, 1921, 11.
4. **Mere seniority does not carry with it the right to command**—Commander ———, commanding officer of the ———, verbally ordered his executive officer, Lieutenant ———, to take a working party of the ——— and the ship ——— or the ——— and to take charge of the net laying operations the following day. Lieutenant ——— boarded the ——— the following morning, but failed to inform the commanding officer of the ———, Ensign ———, of his orders or authority. Ensign ———, on refusing to obey the orders of Lieutenant ———, was tried by court-martial for "disobeying the lawful order of his superior officer."

Held, That there was no evidence to show that Commander ——— had authority to issue orders which in effect placed the executive officer in command of the ——— There was nothing to indicate that a serious emergency existed. Moreover, the Commander ———, Captain ———, was on board the ——— during the time in question. Therefore, the orders issued to the accused by Lieutenant ——— were not lawful orders of a superior officer, within the meaning of article 4, section 2, of the Articles for the Government of the Navy, Lieutenant ———, although the superior officer of the accused, was not vested with authority to issue the orders in question. Even had he

been a superior officer so vested, he must have been known to be such by the accused to constitute the specific offense of disobedience of orders, as alleged. (Winthrop, second edition, page 891.) "No officer can place himself on duty by virtue of his commission or warrant alone" (R. 1047). "The commanding officer is always responsible for the safe conduct of the ship" (R. 2081–5; C. M. O. 26, 1916, 3). "Officers entrusted with command of a vessel must have full command and precedence over all other officers." (R. 1062–(a); C. M. O. 57, 1917, 2.)

5. **Succession**—In a squadron of three vessels, of which one is commanded by a commander, National Naval Volunteers, and each of the other two is commanded by a captain, United States Coast Guard, the commander, National Naval Volunteers should, in contemplation of law, be ordered to command. (File 29762–115: 4, J. A. G., 24 Oct., 1917; C. M. O. 67, 1917, 16.)
6. **Same**—Officers designated for permanent engineering duty are not available for succession to command afloat or to the duties of executive officer in the absence of the executive officer and other intervening officers. (File 28441–227, J. A. G., July 20, 1917; C. M. O. 46, 1917, 24.)

COMMAND, FLEETS AND SQUADRONS.

1. **Status and pay of officers assigned to command:**

The laws applicable to this subject are—

(*a*) **Same**—Commanders or above may command as rear admirals—Active list officers in the grade of commander or above may be assigned to command of squadrons, with rank and title of rear admiral, at any time, either in peace or in war. While section 1434 of the Revised Statutes designates the rank and title of officers so assigned as "flag officers" this can now be only "rear admiral," as has been decided by the department in practice.

(*b*) **Same**—In time of war, retired commanders may command as rear admirals—In time of war, the President may assign any retired officer of the grade of commander or above to the command of a squadron with the rank and title of "rear admiral." (The comment above with reference to the rank and title of active-list officers so assigned applies equally to retired officers.)

(*c*) **Same**—In time of war, captains or above may command as vice admiral or admiral—In time of war the President may assign any active-list officer of the grade of rear admiral or captain to command a fleet or subdivision thereof, with the rank and pay of an admiral or vice admiral.

(*d*) **Same**—Rear admirals may command as vice admiral or admiral—In time of peace, the President may assign any active list officer in the grade of rear admiral to the command of a fleet or subdivision thereof with the rank and pay of admiral or vice admiral.

(*e*) **Same**—Rank generally—The President has general authority to formulate rules governing assignments to command of squadrons in peace or in war, but officers so assigned are not entitled to a higher rank except in the cases noted in paragraphs (*a*) to (*d*) above.

(*f*) **Same**—Rank specially—In the cases noted in paragraphs (*a*) to (*d*) above, officers assigned to such command are entitled to higher rank than that conferred by their regular commissions. They do not, however, attain the grade indicated by their rank—that is to say, they do not by virtue of such assignment to command become officers of the grade of admiral, vice admiral, or rear admiral, although they acquire the rank of such grade. Accordingly, it is not necessary that there should be vacancies in the grade of rear admiral in order to authorize the assignment of officers to command with that rank.

(*g*) **Same**—Precedence—Under the Navy Regulations (R–1048) officers duly appointed to act in any grade shall, while serving under such appointment, be entitled to the same command, precedence, and honors as if they held a commission in that grade of the same date as their appointment.

(*h*) **Same**—Pay of the office—Inasmuch as the officers mentioned are given the rank stated, it would seem that they must also be entitled to the pay of such rank, yet this point has never been decided by the accounting officers and must therefore be regarded as an open question. (File 3809–756, J. A. G.; C. M. O. 88, 1917, 17.)

COMMANDANTS OF NAVY YARDS.

1. **Oaths**—Administration by. *See* OATHS.

COMMANDER IN CHIEF.

1. **Administration of oaths by.** *See* OATHS.

COMMANDING OFFICERS.

1. **Failure to furnish prompt notice to pay officers of indebtedness of enlisted men**—Commanding officers should make every effort to safeguard the interests of the Government and to that end should promptly notify the pay officers of amounts to be deducted from pay accounts of enlisted men pursuant to the sentence of courts-martial; they should refrain from authorizing special money requisitions by enlisted men against whom charges have been preferred. Failure in this regard results in loss to the Government, appeals by pay officers based on these grounds having been allowed by the Comptroller of the Treasury. (Comp. Dec., Feb. 24, 1916, B. Mayer: File 26806–131; 35, J. A. G., Mar. 22, 1916; C. M. O. 9, 1916, 10.)
2. **Navigation**—Duties of the commanding officer with reference to the navigation of his ship. *See* NAVIGATION, COLLISION.
3. **Responsibilities for collision.** *See* COLLISION.
4. **Strict responsibility**—For the efficient performance of duty assigned him. *See* CLEMENCY.
5. **Tried for drunkenness ashore**—A commanding officer of a naval vessel was tried by general court-martial for drunkenness while on shore in a foreign country at a time when conditions ashore were such that he might be called upon at any time, in his capacity as commanding officer, to take measures for the protection of foreign lives and American interests. (C. M. O. 18, 1916.)
6. **Uniform clothing disarranged**—While on shore at a swimming bath club, and in the presence of officers and civilians and intoxicated. Tried by general court-martial. (C. M. O. 18, 1916.)

COMMISSIONED WARRANT OFFICERS.

1. **Of fifteen years' service, as candidates, for commissioned rank.** *See* NAVAL EXAMINING BOARD.

COMMISSION AD INTERIM.

1. **Effects of acceptance.** (C. M. O. 4, 1921, 11
2. **Officers** so appointed are on the same footing in all respects during the time they hold such recess appointments as are those who are appointed with the advice and consent of the Senate in accordance with Article II, section 2, clause 2, of the Constitution of the United States, and rear admirals of the former class are just as eligible for membership on the selection board provided by the act of August 29, 1916, as are those who were confirmed by the Senate. (File 28687–31, J. A. G. 11 Oct., 1920; C. M. O. 127, 1920, 12.)

COMMISSIONS.

1. **Duties imposed upon officers by their commissions**—"The situation involved in this case is not covered by the Navy Regulations, but this fact in no wise relieves an officer of culpability for the neglect of duty which his seniority may impose upon him. Not only is it impracticable to anticipate in the Navy Regulations every contingency which may possibly arise, but an attempt to do so would not be conducive to the proper development of character and officer-like qualities. Neither is it considered, in the interest of efficiency, to restrict too closely the performance of duty by officers, especially those of the higher ranks. Officers have duties and obligations imposed upon them by the commissions which they hold and the positions which they occupy, which are as binding as express provisions of the regulations could be. The language used in an officer's commission imposes upon him the responsibility for the efficient performance of duties in his grade and no court would be justified in relieving of culpability an officer who failed to perform such duties as were imposed by the broad terms of his commission and by the customs of the service, merely because such duties were not definitely enumerated in the regulations." (C. M. O. 27, 1916, 5.)
2. **Effect of issuance as vesting an office**—A second lieutenant in the Marine Corps is nominated by the President and confirmed by the Senate as a temporary first lieutenant in that corps under the provisions of the act of 22 May, 1917; his commission is duly signed, is forwarded to, and received by, the appointee's commanding officer. Subsequently to his appointment as a first lieutenant as aforesaid, but prior to his receipt of notification of appointment and acceptance thereof, the appointee commits an alleged offense and is brought to trial by general court-martial. *Held*, that inasmuch as the appointment was to an office from which the appointee could be removed at the will of the President, the same, though complete when signed and sealed, may nevertheless be withheld and revoked by the Secretary of the Navy, acting for the President. A case such as the foregoing is to be distinguished from one as to which the incumbent is not removable at the will of the President. (File 26260–4837: 1, J. A. G. 13, 15 Sept., 1917; C. M. O. 58, 1917, 11.)

3. **Effective date**—The date of the commission of a naval or marine officer is only to a limited extent under the control of the Secretary of the Navy. The date stated in a commission might be the date on which the vacancy occurred or a later date, but in no case could it properly be a date prior to the occurrence of the vacancy. (File 9466–03; 7151–03; 5460–72:1, May 19, 1912; 16 Op. Atty. Gen. 656; File 29226–6:1, December 1, 1920; C. M. O. 151, 1920, 17.)
4. **Guardia Nacional Dominicana.** *See* APPOINTMENTS.
5. **Issued to marine officers**—Permanent commissions issued to temporary marine officers can not antedate the law that created the vacancies. (File 9466–03; 7151–03, 5460–72:1, May 19, 1915; 16 Op. Atty. Gen. 656; File 29226–6:1, December 1, 1920 C. M. O. 151, 1920, 16.)
6. **Probationary**—Appointment distinguished from reinstatement. *See* APPOINTMENT.
7. **The signature of the Secretary but the act of the President**—It is lawful for the Secretary of the Navy to sign commissions issued to officers, but it is proper that the commission should declare the act to be the act of the President, performed by the head of the department as his representative. (22 Op. Atty. Gen. 82; 28 Ct. Cls. 392.) Accordingly, all commissions to officers not above the rank of commander in the Navy and lieutenant colonel in the Marine Corps will be so signed. (File 22724–34, J. A. G., July 28, 1917; C. M. O. 46, 1917, 21.)
8. **Military.** *See* MILITARY COMMISSIONS.

COMMON LAW.

1. **Sentences**—In accordance with the common law. *See* Naval Digest, 1916, "Constitutional Rights of Accused."

COMMUTATION OF RATIONS. *See* RATIONS.

COMPENSATION.

1. **For duty involving flying**—It is required that certificates for use as evidence to establish claim for extra compensation for duty involving flying should show the capacity in which the officer or man is detailed, duty to which detailed, the station where he is in the performance of duty for which detailed, that said duty during the period of current detail included actual flight by the applicant in aircraft, and the date of the last flight made. The certificate should be made by the officer or man claiming the increase of pay and should, in case of either, bear the approval of the commandant. In the case of an enlisted man, the approval of his certificate by the officer immediately in charge of him should precede that of the commandant. (File 28569–7, J. A. G., April 26, 1917; C. M. O. 32, 1917, 5.)

COMPETENCY.

1. **Of witnesses.** *See* WITNESSES.

COMPOSITION OF COURTS-MARTIAL.

1. **Trial**—The majority of the members of a general court-martial for trial of officers or enlisted men of the U. S. Navy or Marine Corps must be members of the regular naval service. (C. M. O. 33, 1917, 5.)

COMPTROLLER OF THE TREASURY.

1. **Policy of the department with regard to requests for reconsideration of decisions**—It is not the policy of the department to request the Comptroller of the Treasury to reconsider his decisions in individual cases unless such decisions tend to disturb the practice of the service based on naval regulations or instructions issued pursuant to law. (File 26254–1947, Sec. Nav., Jan. 19, 1916; C. M. O. 3, 1916, 8.)

CONCURRENT JURISDICTION. *See* JURISDICTION.

CONCURRENT RESPONSIBILITY IN NAVIGATION.

1. **Commanding Officer and Navigator**—"Article 2404, Navy Regulations, 1913 (3), requires that 'If the commanding officer is conning and the navigator thinks the ship is running into danger, he shall so inform the commanding officer and advise him as to a safe course to be steered.' It is believed that the full purport and value of this regulation is frequently overlooked. This warning, which is required by regulations, is as important a portion of the duties of navigator as are the ordinary methods of piloting; this regulation is not intended to be permissive, it is mandatory. The keeping afloat of a vessel of war is a duty so important that the Government, in order to safeguard itself and insure a check against those unaccountable lapses which sometimes occur in any individual, however proficient he may be, has prescribed a concurrent responsibility in regard to the navigation thereof." (C. M. O. 24, 1916, 3; art. 1010 (3), Navy Regulations, 1920.)

2. **Degree of guilt of each**—"Where concurrent responsibility is imposed by the regulations upon several individuals and an accident occurs, it is illogical to hold that a junior is guiltless because a senior was present. The concurrent responsibility which has been established by the Navy Regulations is an additional safeguard of the Government in keeping its ships afloat; not to recognize this in effect nullifies this feature of the regulations. In such cases an endeavor to place the burden of entire responsibility upon some one individual results in confusion and a miscarriage of justice. The only logical method is to hold each individual concerned responsible not for the accident itself but for neglect of such of his individual duties as may have contributed to the accident." (C. M. O. 24, 1916, 5.)

CONDITIONAL REMISSION OF SENTENCE. *See also* BAD CONDUCT DISCHARGE.

CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE. (C. M. O. 10A, 1921.)

1. **Act necessary to constitute the offense.** (C. M. O. 2, 1921, 16.)
2. **Error of judgment in time of war**—Does not warrant conviction of "conduct to the prejudice of good order and discipline" when no material consequences are involved. (C. M. O. 87, 1917.)
3. **Same**—Does not always demand punishment of an officer. *See* IN TIME OF WAR.
4. It is proper to charge an accused with either "absence from station and duty after leave had expired" or "absence from station and duty without leave" in addition to "conduct to the prejudice of good order and discipline" where the absence was with the manifest intention of evading some particular duty (as coaling ship or a landing party) or of service on some particular ship. But it is improper to charge him with "missing ship" under the above circumstances. (G. C. M. Rec. No. 31600; C. M. O. 3: 8; 14; 1916.)
5. **Missing ship.** *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE.
6. **Missing ship**—"Well knowing that the said ship * * * was to sail on or about * * * 196—" is gravamen of offense. (C. M. O. 77, 1919, 14.)
7. **One may be guilty of, who is absent over leave, though not deliberately and willfully absent.** (C. M. O. 77, 1919, 14.)
8. **Simple unauthorized absence not properly chargeable under.** *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE.
9. **Violation of a law or regulation of a foreign port may constitute.** (C. M. O. 109, 1918, 3; G. C. M. Rec. No. 39237.)

CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN.

1. **Debts**—An officer failing to pay his debts may be tried by general court-martial under the charge of "Conduct unbecoming an officer and a gentleman." (C. M. O. 15, 1916.)
2. **Same**—Example of an officer failing to pay his debts being tried by general court-martial under this charge. (C. M. O. 15, 1916.)
3. **Definition of offense.** (C. M. O. 2 (17); C. M. O. 7, 1921, 12).
4. **In the Army, the sentence of dismissal is imperative**—A naval officer was charged with the above offense and in returning the record for revision the department invited attention to the fact that Congress has by law for the Army made the sentence, on conviction of the above offense, dismissal. Though there is no statutory enactment in reference to the Navy, the foregoing is sufficient evidence of how seriously this particular offense has been regarded by Congress. (C. M. O. 12, 1916.)
5. **Officers**—An officer charged with "Fraud in violation of article 14 of the Articles for the Government of the Navy" was found guilty in a less degree than charged, guilty of "Conduct unbecoming an officer and a gentleman." (C. M. O. 4, 1916.)
6. **Sentence**—Of dismissal is mandatory in the Army and should be in the Navy. (C. M. O. 12, 1916.) *See also* ARMY, 1.

CONFESSION.

1. **By witness in open court**—It is well settled that the privilege of declining to answer on the ground of incrimination or self-degradation is a purely personal one and can be claimed only by the witness himself, and not by the accused, his counsel, or any other person. In proper cases, however, the court may, in its discretion, inform the witness of his rights. The accused can not object to such testimony and the witness may waive his privilege and testify in spite of any objection coming from the accused, his counsel, or any other person. (*See* sec. 163, Naval Courts and Boards, 1917.) The witness may waive the privilege by failing to make timely objection. For still stronger reasons, the privilege is waived if no objection whatever is made (3 Jones on Evidence,

p. 893). The privilege being for the protection of the witness, he may waive it, but once having elected to do so he is not permitted to stop but must go on and make a full disclosure. (Dudly, p. 290; *see also* C. M. O. 17, 1910, 15; C. M. O. 253, 1919, 3; G. C. M. Rec. No. 43991.)

2. **Dispenses with proof.** *See* ADMISSIONS.
3. **Foundation for, was laid by introducing in evidence official reports of the offense**—An accused was tried for absence from station and duty without leave, and pleaded not guilty thereto. A witness for the prosecution called and testified to the fact that the commanding officer of the accused had officially reported to him that the accused was absent without leave. This witness further testified that he directed the commanding officer to make that report in writing. The witness then identified the official report and it was offered in evidence. The accused objected to the introduction of this documentary evidence. The objection was overruled by the court. Official reports made contemporaneously with the facts stated therein are admissible as evidence. (Nav. Dig. 19, 31; p. 326.)

   With this foundation the prosecution introduced in evidence by the testimony of several witnesses confessions made by the accused to these witnesses of the offense charged. The accused in his statement also admitted the facts charged.

   "As the letter objected to was an official report as required by Article R-3640, U. S. Navy Regulations, I am of the opinion that the court properly admitted it in evidence and therefore a proper foundation was laid for the admission in evidence of the confession of the accused." (G. C. M. Rec. No. 45371; C. M. O. 14, 1920.)
3. **Involuntary**—The judge advocate offered in evidence the testimony of the accused before a board of investigation which amounted to a confession. Objection was made by the accused's counsel to the admission of the testimony on the ground that the confession was involuntary and he requested permission of the court to call witness to show the same to be the involuntary act of the accused. The court admitted the confession of the accused, stating that if it was shown that the confession was given involuntarily it would be stricken out. In this the court committed a prejudicial error, proof that a confession is voluntary being a condition precedent to the admission thereof; otherwise the court might be prejudiced by the admission.

   The defense after the admission of this confession, proved by the testimony of the senior member of the board of investigation that the accused was not advised that he was an interested party or a defendant and as such that he has a right to be represented by counsel, to be present, and to be confronted by the witnesses against him, to call witnesses in his defense, and to make a statement. These irregularities in themselves might not be sufficient to show the confession involuntary. (Naval Digest, 1916, p. 102, Confessions, 26–27.) However, the defense further proved that the accused was brought before the board of investigation under arrest and that he was compelled to testify under oath. This alone is sufficient to show the confession involuntary and a conviction thereupon illegal. (Naval Digest, 1916, p. 103, Confessions, 17.) (C. M. O. 147, 1919, 1–2; G. C. M. Rec. No. 43319.)
4. **Judicial**—"The plea of guilty is a judicial confession and dispenses with evidence to prove the facts set forth in a specification. To a lesser extent, an admission in open court of any material fact set forth in a specification when such admission is voluntarily made by the accused or by his counsel in his presence and with his express or implied authority, is a judicial confession of such fact and dispenses with the necessity of evidence to establish the same. 'Admissions of defendant are competent to show his authorship or publication of the defamation' (25 Cyc. 582)." (File 26251–12159, Dec. 9, 1916, p. 10.)
5. **May not be used to establish the corpus delicti.** (C. M. O. 2, 1921, 18.)
6. **Statement made by accused to commanding officer**—The fact that the accused confessed to his commanding officer who was investigating the case does not of itself throw doubt upon the truthfulness of his confession and thus render it inadmissible. (C. M. O. 7, 1914, pp. 13–15; Index Digest, 1914, p. 10.) Nor does the fact that he was not warned that any statement that he might make during such investigation present grounds for an objection to the introduction of his voluntary statements to his commanding officer as a confession. (C. M. O. 12, 1904, 4; 31, 1911, 6; Index Digest, 1914, p. 10; File 26262–2478, Sec. Navy, Jan. 31, 1916; G. C. M. Rec. No. 31605; C. M. O. 3, 1916, 6.)

CONFINEMENT. *See also* DISMISSAL AND IMPRISONMENT.

1. **Escape from.** *See* "HIS OWN WRONG."
2. **On full pay**—Is contrary to policy of the department. *See* SENTENCE.
3. **Sentence**—When sentence includes term of confinement, together with "accessories," the confinement should not be remitted without remitting the loss of pay, in whole or in part. (C. M. O. 3, 1917, 4.)
4. **Unauthorized sentence.** (C. M. O. 7, 1921, 11.)

CONGRESS.

1. **Appointing power**—Congress can not restrict. *See* APPOINTING POWER.
2. **Powers of.** *See* POWERS.

CONSCIENCE.

1. **"According to their own consciences"**—It is the duty of deducing the facts from a consideration of the evidence that the part of the oath administered to members requiring them to try a case "according to their own consciences" refers. (C. M. O. 25, 1916, 4.)

CONSPIRACY.

1. **What constitutes and how alleged**—Upon considering the charge "Conspiracy in violation of article fourteen of the Articles for the Government of the Navy" it is noted that the word "conspiracy" is not defined by said article and that recourse must be had to the act of Congress approved 4 March, 1909 (35 Stat. 1088, sec. 37), which defines "conspiracy" as follows:

"If two or more persons conspire either to commit an offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

This section has been further interpreted by the Federal courts of the United States to the effect that the crime of conspiracy requires some overt act to be committed in pursuance of and as a result of said conspiring (148 U. S. 202; 67 Fed. 705; 55 Fed. 21, and 8 Cyc. 625). In the case of Pettibone *v.* United States, 148 U. S. 202, the court states:

"The confederacy to commit the offense is the gist of the criminality under this section, although to complete it some act to effect the object of the conspiracy is needed. * * * the overt act in effectuation of that purpose must appear charged in the indictment; and in United States *v.* Thompson, 67 Fed. 705; but, under the statute of the United States now under consideration (sec. 37) the doing of some act in pursuance of a conspiracy is an ingredient of the crime, and must be established as a necessary element to the offense, although the act need not be in itself criminal or amount to a crime." (File 26262-3363, G. C. M. Rec. No. 41585; C. M. O. 190, 1918, 18.)

2. **Essential elements of**—An accused was charged with "conduct to the prejudice of good order and discipline," the specification of the charge alleging a conspiracy. An examination of the record disclosed an entire absence of evidence to show the existence of a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means. The aforesaid elements being essential to establish conspiracy. (8 Cyc. 620; Pettibone *v.* United States, 148 U. S. 197; File 26262-6491, 9 June, 1919; C. M. O. 209, 1919, 16.)

CONSTITUTIONAL LAW.

1. **Congress, by its war powers, may make civilians amenable to jurisdiction of court-martial.** *See* CIVILIANS.

CONSTITUTIONAL PRIVILEGES.

1. **As to self-incrimination**—A witness may waive the privilege by failing to make timely objection. For still stronger reasons the privilege is waived if no objection whatever is made. (3 Jones on Evidence, p. 893). (C. M. O. 253, 1919; G. C. M. Rec. No. 43991.)

CONSTITUTIONAL RIGHTS OF ACCUSED. *See also* SELF-INCRIMINATION.

1. **Adverse comment on failure of accused to testify**—The reference of the judge advocate in his closing remarks to the fact that the accused failed to take the stand as a witness in his own behalf is improper and contrary to the spirit of the act of 16 March, 1878 (20 Stat. 30), which provides as follows: "That in * * * proceedings against persons charged with the commission of crimes, offenses, and misdemeanors,

in * * * courts-martial and courts of inquiry * * * the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." But where the proofs of guilt are so clear and conclusive that the cause of the accused could not have been harmed by such reference, the proceedings need not be set aside. (*See* Naval Digest, 1916, p. 647, sec. 11; File 26251–14575; G. C. M. Rec. No. 36585; C. M. O. 30, 1918, 19.)

2. **Assistance of counsel**—The accused, in a recent case, stated that he desired counsel. The record then recites "the matter was referred to the convening authority by telephone, who denied the request of the accused for counsel on the ground that they have no officer available for the purpose."

   It is the constitutional right of an accused being tried before criminal courts to have the assistance of counsel, and naval courts, though not bound by the letter, are within the spirit of this provision. Therefore, it is held that only in extreme cases might this right be denied an accused without committing a fatal error. Furthermore, if that right is denied, it certainly devolves more than ever upon the judge advocate to protect the interests of the accused. The Judge Advocate General was of the opinion that in the case in question a fatal error had been committed by denying him the counsel requested. (File 28762–11: 80; C. M. O. 15, 1918, 15.)

3. **Former jeopardy**—Upon a former trial the court had directed an acquittal upon the ground of a variance between the proof and the facts charged in the indictment. A second indictment was found for the same offense, upon the trial of which the defendants urged that in fact there was no material variance between the proof upon the former trial and the allegations of the first indictment; that, therefore, the defendants had been once put in jeopardy and consequently the second indictment was within the constitutional prohibition. *Held*, That "whether the variance referred to was or was not material, we think the defendants can not now be permitted to question the position which they took upon that head on the former trial. The record of that trial distinctly shows that the defendants there claimed that the variance was material; * * * having requested the court to rule in their favor in these particulars and the court having thereupon directed an acquittal upon these very grounds, they can not now be heard to say that there was no material variance." (C. M. O. 22, 1916, 7.)

4. **He may waive them**—The right of the accused to be confronted with witnesses against him at his trial is one which he may waive. (Mullam *v.* U. S., 212 U. S. 516; Diaz *v.* U. S., 223 U. S. 442; C. M. O. 46, 1917, 15.)

5. **Same**—"Article six of the amendments to the Constitution * * * gives the accused a right to trial by jury. But the same article gives him further right to be confronted with the witnesses against him, and to have the assistance of counsel. Is it possible that the accused can not admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional nor statutory mandate and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy." (Schick *v.* U. S., 195 U. S. 65; C. M. O. 48, 1920, 21.)

6. **His refusal to answer incriminating questions**—"The tender of his (accused's) testimony is a waiver of every form of the exemption from incriminating himself; so that, without the violation of any terms of the constitutional guaranty, he may be fully questioned concerning his alleged crime. But he can not be required to disclose other and independent offenses, though to avoid this on cross-examination he must claim his privilege like any other witness." (Bishop's New Criminal Procedure, vol. 2, sec. 1183; Naval Courts and Boards, 1917, sec. 161; File 26251–15777; G. C. M. Rec. No. 37122; C. M. O. 37, 1918, 15.)

7. **Naval courts-martial**—Judge Advocates General of the Navy have held that the constitutional safeguards and immunities do not apply to members of the naval service on trial for crime before naval courts-martial, yet they also have uniformly held that "military courts, though not bound by the letter, are within the spirit of the constitutional guarantees." (C. M. O. 48, 1920, 11.)

8. **Same**—It has been held under the Constitution that an accused has the right of counsel for his defense; to be confronted with the witnesses against him; to compulsory process for obtaining the presence of witnesses for his defense; that he can not be compelled to give evidence against himself; no cruel or unusual punishment can be inflicted upon him; he can not be placed twice in jeopardy for the same offense; he has the

right to be present during all stages of the trial; he is entitled to a speedy and public trial; and to be secure in his papers from unreasonable searches and seizures; and in the absence of legislation, a police officer of a State can not arrest him without a warrant or military order. (C. M. O. 48, 1920, 12.)

9. **Same**—The attitude of the Navy Department has been, usually, to insist upon the accused being granted the benefit of constitutional guarantees, although insisting at the same time that he is not legally entitled to such benefits in the absence of specific legislation. (C. M. O. 48, 1920, 12.)
10. **Same**—All the amendments to the Constitution of the United States are applicable to persons in the land and naval forces, in letter as well as in spirit, except the sixth amendment, and so much of the fifth amendment as relates to presentment or indictment by a grand jury. (Runkle *v.* U. S. 19 Ct. Cls. 410, 411; 22 Op. Atty. Gen. 137; Weirman *v.* U. S. 36 Ct. Cls. 236; 9 Op. Atty. Gen. 230; Grafton *v.* U. S. 206 U. S. 352; C. M. O. 48, 1920, 14.)
11. **Public trial**—An accused on trial before a naval court-martial may expressly waive his right to a public trial. (C. M. O. 48, 1920, 10.)
12. **Same**—It has been held in some States that an accused can waive his right to a public trial by failure to object or by himself requesting it. (Benedict *v.* People, 23 Colo. 126, 46 Pac. 638; Carter *v.* State, 99 Miss. 435; 54 So. 734; C. M. O. 48, 1920, 19.)
13. **Same**—Persons in the naval service accused of crime are entitled to certain of the safeguards and guarantees of the Constitution of the United States, including the right to a public trial. (C. M. O. 48, 1920, 10.)
14. **Same**—"The statutes regulating the course of procedure in military courts show that, in contemplation of Congress, these courts stand on the same footing as other judicial tribunals of the country. Their sittings, for example, are free to the attendance of the public, like those of other courts, and, as if to guard against improper secrecy in the case of courts-martial held in the Army, the statute expressly provides that no proceedings or trials in such courts shall be carried on except between the hours of eight in the morning and three in the afternoon; except in the cases which, in the opinion of the officer appointing the court-martial, require immediate example." (11 Op. Atty. Gen. 141; C M. O. 48, 1920,16.)
15. **Use of depositions.** *See* DEPOSITIONS.

CONSTRUCTIVE PARDON. *See* PARDON, CONSTRUCTIVE.

CONTENTS OF RECORD OF OFFICER.

1. **Court**—Can not properly take cognizance of contents of record of officer until same is introduced in evidence. (C. M. O. 17, 1917.)

CONTINUOUS OFFENSE. *See* FRAUDULENT ENLISTMENT.

CONTINUOUS SERVICE. *See also* FLEET NAVAL RESERVE, RETIREMENT.

1. **Effect of holding temporary warrants or commissions**—Under the provision of section 7 of the act of 22 May, 1917, an enlisted man given a temporary warrant or commission would not in consequence of his acceptance thereof, lose his continuous service as an enlisted man. (File 7657-448, J. A. G., June 18, 1917; C. M. O. 37, 1917, 14.)
2. **Service of temporary warrant or commissioned officers**—Under the act of 22 May, 1917, enlisted men of the Navy and Marine Corps who have served as temporary warrant or commissioned officers, upon reverting to enlisted status, are entitled to count the time they have served as temporary commissioned or warrant officers in computing the service required under the act of 29 August, 1916, to entitle them to transfer to the Fleet Naval Reserve. (File 7657-445:2, Sec. Nav., 5 Oct., 1917; C. M. O. 67, 1917, 17.)

CONTRACT.

1. **Enlistment contract.** *See* ENLISTMENT.
2. **Of enlistment.** *See also* DESERTION.

CONVENING AUTHORITY.

1. **Can not place accused on probation after remitting sentence**—*Held*, That the convening authority having remitted the sentence, has exhausted his power, and that the part of his action placing the accused on probation was a nullity. (File 26262-6106; G. C. M. Rec. No. 42726; C. M. O. 114, 1920, 14.)
2. **Motion to strike.** *See* MOTION TO STRIKE.
3. **Ordering himself to duty as a member of a summary court-martial.** *See* SUMMARY COURT-MARTIAL.

4. **Reference of record**—The convening authority should note in his action upon case involving dismissal of an officer, the reference of the record to the Secretary of the Navy for transmission to the President. (C. M. O. 4, 1917, 2.)
5. **Remarks of**—It is the duty of the convening authority when he considers the proceedings of the court erroneous or ill-advised to reconvene the court for the purpose of correcting the alleged defects, at the same time furnishing the court with the grounds of his opinion. However, it is not within the province of the convening authority to endeavor to coerce the court to adopt his view by threats of disciplinary action. There is an end to the administration of justice by a court-martial if the convening authority may by threats cause a sentence to be increased until he gets the court to adjudge the sentence he desires. (File 26262-6318, J. A. G., May 9, 1919; C. M. O. 187, 1919, 24.)

CONVICTION.

1. **Evidence tending to proof of**—Duty of court to receive and duty of judge advocate upon its receipt to subject it to the usual tests of cross-examination. (C. M. O. 224, 1919.)
2. **Illegal**—Based upon involuntary confession. *See* CONFESSION. (C. M. O. 147, 1919.)
3. **Extract from service record showing**—Must show dates of approval to be admissible in evidence—Extracts from the current service record of an accused showing previous trials and convictions are inadmissible as evidence unless the dates of approval are shown.

   In two cases where the above irregularities were committed, however, they were not held to be such as to invalidate. (File 26262-5389, G. C. M. Rec. No. 41072, and File 26262-5503, G. C. M. Rec. No. 41086; C. M. O. 190 ,1918, 19.)

COPY, CERTIFIED. *See* CERTIFIED COPY.

CORPUS DELICTI. Circumstantial evidence. (C. M. O. 12, 1921, 7.)

COUNSEL.

1. **Admissions made in behalf of the accused must be assented to by the latter.** *See* ADMISSIONS.
2. **Criticism of.** (C. M. O. 8, 1921, 10.)
3. **Detail of, for accused.** (C. M. O. 7, 1921, 11.)
4. **Improperly defended accused**—Assigned as basis for new trial. *See* NEW TRIAL.
5. **It is not in province of, to make a statement**—It is provided by Naval Courts and Boards, 1917, sections 313 and 314, that he (counsel) shall be afforded an opportunity to present an argument of the character specified, but a distinction is made between argument of counsel and statement of accused. The latter may be either written or oral. If written, the counsel for the accused may prepare and read it for him, but other than that he has no part connected therewith. And whatever be the method of introduction employed, the contents of said statement should be restricted to that authorized in Naval Courts and Boards, 1917, section 311. (File 26251-16487, Sec. Navy, May 24, 1918; G. C. M. Rec. No. 38242; C. M. O. 50, 1917, 18.)

COUNSEL FOR ACCUSED.

1. **Argument.** (C. M. O. 11, 1921, 11.)
2. **Improper argument.** (C. M. O. 12, 1921, 7.)

COURT.

1. **Absence of member of court**—It is a fatal error for court to continue trial on second day with member present who was absent the first day without recalling the witnesses and having their testimony read and verified. (C. M. O. 84, 1917; G. C. M. Rec. No. 35756.)
2. **Authority for adjournment should appear in the record**—The record of the proceedings of a general court-martial recited that the court, at the close of the first day's session, adjourned to meet the following day. The record, however, indicated that the court did not meet for eight days, and showed no authority for this suspension of proceedings. *Held*, a general court-martial is required to sit from day to day, Sundays excepted, until sentence is imposed, unless temporarily adjourned by the convening authority. (Art. 45, A. G. N.) (File 26251: 13993; C. M. O. 4, 1918, 16.)
3. **Composition of**—The exigencies of the service permitting, the court should be composed of officers not cognizant of the circumstances attendant upon the offense for which an accused may be brought to trial. (C. M. O. 138, 1919, 2; G. C. M. Rec. No. 42751.)

4. **Deliberately disregarding precedents**—A court decided to act contrary to the rulings laid down in the Naval Digest, 1916, page 643, sections 11, 12, and 13, and allowed the wife of the accused to testify in his behalf. *Held*, That the court erred, although the finding indicates that it was not improperly influenced by the testimony in question. (C. M. O. 81, 1917, 2.)
4. **Errors by**—Finding charge and specification in due form and technically correct, when accused charged under a general charge of an offense specially provided for by Articles for the Government of the Navy. (C. M. O. 225, 1919, 4.)
5. **Error**—To find accused guilty of a specific offense under a general charge. (C. M. O. 225, 1919, 4.)
6. **Improper correction of charges and specifications**—A court, apparently recognizing technical errors in the charges and specifications, endeavored to correct them by excepting certain words and substituting others. *Held*, This was error, as the court is not permitted to correct technical errors in charges and specifications without the consent of the convening authority obtained before hearing the evidence in the case. (Naval Courts and Boards, 1917, sec. 56 (2); C. M. O. 23, 1919, 3.)
7. **Irregular absence of member**—A court excused a member from attending because he was engaged in other important duties. *Held*, This action was highly irregular and censurable. A court is not empowered to excuse the absence of one of its members for any reason other than those set forth in regulations, and the record in each case should show the authority therefor. (Naval Courts and Boards, 1917, p. 187, secs. 241, 243, and 244; C. M. O. 16, 1918, 4.)
8. **Members**—Action of member in remaining on the court and sitting in judgment on the accused, having prior to trial formed an opinion as to the guilt of the accused even though unobjected to is highly improper. (C. M. O. 109, 1919.)
9. **Same**—Challenge of, who are also witnesses. A number of court-martial records have been received in the department in which Naval Courts and Boards, 1917, page 349, section 288, as amended by Changes, Naval Courts and Boards No. 2, was misconstrued, in that the accused were notified of their rights to challenge every witness for the prosecution who appeared before the court, when in fact no such right exists. Such procedure is wrong. The purpose of this change was to accord an accused an opportunity at the conclusion of the testimony of a member of the court to test the qualifications of that member of the court to sit as a member, where the accused believes that by reason of the dual status of the member as a witness and as a member of the court such member can not render impartial judgment on the merits of the case. It is not the purpose of Changes, Naval Courts and Boards, No. 2, to test the competency of the member as a witness nor to test the competency of any witness, inasmuch as that purpose can not be accomplished by challenge. (C. M. O. 296, 1919, 12.)
10. **Same**—Presence of, at an investigation of the offense for which the accused is being tried, not invalidating error. (C. M. O. 136; 138; 1919; *See* COURT, 3, 11.)
11. **Members as witnesses**—While not illegal, it is considered inadvisable to have among the members constituting a court-martial, officers who appear as principal witnesses for the prosecution. Whenever the exigencies of the service will permit, a court should as far as possible be composed of officers who are not cognizant of detailed circumstances attendant upon offenses for which an accused may be brought to trial. (*See* Navy Regulations, 1913, R–702 (2); G. C. M. Rec. No. 25157; C. M. O. 9, 1916, 8.)
12. **Same**—A member of the court was called as a witness for the prosecution and testified that he examined the accused and made entry in his service record to the effect that his condition was due to his own misconduct resulting from over indulgence in alcohol. For this opinion formed prior to trial the proceedings, findings, and sentence were disapproved. (C. M. O. 109, 1919.)
13. **Members challenged**—On the ground that "similar case having been tried, said member has unconsciously formed an opinion; and regardless of what the finding was, said member will be influenced thereby in this case, as the charge and specification are identical." Court erroneously refused to sustain the respective challenges of accused, except in the case of one member who stated he had formed an opinion. (C. M. O. 151, 1919, 2.)
14. **Motion to strike**—Should be decided by court—not by convening authority. (C. M. O. 12, 1919.) *See* MOTION TO STRIKE.
15. **Not justified in relieving an officer of responsibility**—Merely because the question involved was not covered by the Navy Regulations. *See* COMMISSIONS.

16. **Precept**—Document modifying precept should be read as part of proceedings of court-martial. (C. M. O. 82, 1917, 2.)
17. **President**—Illegally sitting as a member after being relieved from duty with court resulted in vitiating proceedings. (C. M. O. 151, 1919.)
18. **Proceedings of**—Irregularities not sufficient to invalidate; accused not represented by counsel makes statement and record does not show that provisions of sec. 253 (*a*) Naval Courts and Boards, 1917, have been complied with. (C. M. O. 177, 1919.)
19. **Same**—Vitiated by president illegally sitting as a member, after being relieved from duty with. (C. M. O. 151, 1919, 3).
20. **Sentence**—Mitigation. *See also* MANUAL FOR THE GOVERNMENT OF U. S. NAVAL PRISONS, etc.
21. Will draw its own inferences and will not permit the witness to do so for it. *See* EVIDENCE.

COURTS, EXCEPTIONAL MILITARY.

1. **Convened by naval authority**—Since a naval court-martial is a court of limited jurisdiction, restricted by law to the trial of officers and men of the naval service, it sometimes becomes necessary for the naval establishment, when its duty is such as to place under it the wider jurisdiction conferred by the exercise of military government, to employ tribunals other than courts-martial and which have been referred to as exceptional military courts. These exceptional military courts unlike courts-martial, derive their sanction from the laws of war and not from the enactments of Congress. Among such exceptional military courts are included the military commission, the superior provost court, and the provost court. While the military commander of occupying forces is, by the laws of war, charged with the administration of occupied territory, and is, therefor, not to be unduly restricted in the measures to be employed in such administration, rules have been laid down on this subject as a guide in respect to these exceptional military courts. *See also* MILITARY COMMISSIONS; SUPERIOR PROVOST COURTS; PROVOST COURTS. (C. M. O. 15, 1917, 8.)
2. **Delegation of powers of convening authority**—When a military commander or governor desires to authorize an officer under his command to convene any of the exceptional military courts, he may delegate such authority to a subordinate, but the latter may so act only as a representative and in the name of the military commander or governor. When so acting, such subordinate officer may, subject to any action in remission or mitigation he may see fit to take, upon his own approval, put into immediate execution the sentence of such exceptional military courts as a military commander or governor has empowered him to convene. But in all cases the records of such courts shall be forwarded to the military commander or governor, who reviews all such records and who may set aside the proceedings, or remit or mitigate, in whole or in part, the sentences imposed by any exceptional military court convened by his order or by that of his predecessors in command, or by that of any officer under his command or the predecessor of any such officer. Note however that nothing herein shall be taken to modify the limitations prescribed in C. M. O. 13, 1916, 6, to the effect that no sentence of death shall be carried into execution until confirmed by the Secretary of the Navy. (C. M. O. 15, 1917, 9.)
3. **Limitations on the use of these courts**—In so far as practical, the employment of exceptional military courts should as a general rule be restricted to the trial of offenses in the breach of the peace, in violation of military orders or regulations, or otherwise in interference with the exercise of military authority. (C. M. O. 15, 1917, 9.)
4. **Power to convene**—The authority to convene exceptional military courts vests only in the commander or military governor of an occupied territory, and all such courts may be ordered only in the name of such commander or governor. (C. M. O. 15, 1917, 9.)

COURTS OF INQUIRY.

1. **May be convened by any officer empowered to convene general courts-martial**—Specific authority is not necessary under those conditions. (File 26504-287, 83-B, Sec. Navy, 19 Aug., 1920; C. M. O. 115, 1920, 15.)
2. **Records as evidence.** *See* EVIDENCE.
3. **Proceedings as evidence.** *See* EVIDENCE, DOCUMENTARY.
4. **Record of proceedings of, as evidence before courts-martial**—In legislating that the proceedings of a court of inquiry shall be evidence before a court-martial in certain defined cases, Congress did not undertake to curtail the rights of an accused, but to enact a law which would render more effective court-martial proceedings when certain needed witnesses were not available by saying in effect that in a court of inquiry the defendant or person made a party thereto, having been present thereat, accorded

counsel and afforded opportunity to cross-examine witnesses, and having thereby been accorded his constitutional right of confrontation with and cross-examination of witnesses against him, such evidence as witnesses may, under those conditions, have given, may be used at a subsequent trial, if the witness who has so testified is not available, and in cases not capital or extending to the dismissal of a commissioned or warrant officer. (File 26251–16166, G. C. M. Rec. No. 40750; C. M. O. 174, 1918, 17; *see also* C. M. O. 46, 1917.)

5. **Weight as evidence.** *See* WEIGHT OF EVIDENCE. *See also* EVIDENCE, DOCUMENTARY.

COURTS-MARTIAL.

1. **Compulsory attendance of civilian witnesses**—The president of a general court-martial sitting within any State has power to compel the attendance of civilian witnesses who reside within the State, and wilful neglect or refusal to appear renders such witnesses liable to civil prosecution. Where a person residing without the State is willing to appear as a witness and it is desirous to have him so appear, he may be tendered his fees and mileage. (Naval Courts and Boards, 1917, section 124; file 28025–524:3, J. A. G., 26 Dec., 1917; C. M. O. 88, 1917, 15.)
2. **Jurisdiction.** *See* JURISDICTION.
3. **Multiplicity of trials.** (C. M. O. 9, 1921, 10.)
4. **Of former members of naval service**—For offenses committed while in service. An enlisted man of the naval service while employed in the naval post office receipted for a registered package belonging to another enlisted man and extracted therefrom a Liberty bond. He was subsequently discharged and upon discovery of the offense the opinion of the department was requested as to whether under article 14 of the Articles for the Government of the Navy, he could be apprehended and brought to trial by naval general court-martial for the offense.

   Article 14 of the Articles for the Government of the Navy relates to frauds against the United States and the theft, etc., of property of the United States. It does not cover the theft of the property of an individual, and therefore does not include the class of theft under consideration in this case.

   In a recent case the following question was submitted to the Attorney General for an opinion:

   "Whether a person in the United States Navy or in the United States Naval Reserve Force, and subject to the laws and regulations for the government of the Navy, who commits an offense against such laws and regulations can be brought to trial before a naval general court-martial, or otherwise punished for the offense, after he has been discharged from the Navy, or released from active duty therein, but within two years after the date of the commission of such offense."

   On 10 July, 1919, the Attorney General, after reviewing the authorities, came to the conclusion that a person discharged from the naval service before proceedings are instituted against him for violations of the Articles for the Government of the Navy, excepting article 14, can not thereafter be brought to trial before a court-martial for such violation, though committed while he was in the service.

   In cases of this kind, the facts should be reported to the United States attorney in order that proper action may be taken by the civil authorities. (File 28550–511; 3, Sec. Nav., 15 Oct., 1919; C. M. O. 296, 1919, 12.)
5. **Precedent**—The department feels that should it approve the inadequate sentence as adjudged, a precendent would be established which in future would affect adversely the interests of justice and discipline. (C. M. O. 10, 1916, 2.)
6. **Procedure of, upon improper plea of accused.** (C. M. O. 9, 1921, 11.)
7. **Reconvening of.** (C. M. O. 9, 1921, 11.)
8. **Retired officers as members.** *See* JURISDICTION.
9. **Disapproval**—Convening authority disapproved the finding and sentence in revision, for the reason that the sentence was wholly inadequate. (C. M. O. 4, 1916, 3.)

COURT-MARTIAL DUTY.

1. **Duty of officers officially informed of having been named in a precept.** *See* OFFICERS.

COURT-MARTIAL ORDERS.

1. **Errors in**—Statement at top of page 22, C. M. O. 129, 1918, to the effect that an accused whose enlistment expired while awaiting trial by court-martial, but who had not been given a discharge, was "still in the Navy." While he is still subject to the jurisdiction of a naval court-martial upon the charges to which he is being so held, he is no longer in the Navy. (C. M. O. 39, 1919, 17.)

2. **Members of courts-martial**—"Members of naval courts-martial are bound by their oaths to consult and apply" information in court-martial orders. (File 26251-12159, Sec. Navy, Dec. 9, 1916, p. 10.)
3. **Officers**—Presumed to know subject matter of court-martial orders and be governed accordingly. (C. M. O. 25, 1916, 2.)
4. **Overruled**—C. M. O. 50, 1918, 18, 19, which conflicts with C. M. O. 77, 1906 and C. M. O. 5, 1912, and which inadvertently followed earlier ruling, overruled. (C. M. O. 208, 1919, 8.)

COURTS MILITARY. *See also* MILITARY COMMISSIONS; SUPERIOR PROVOST COURTS; PROVOST COURTS.

"CREDITABLE RECORD"—As applied to the clause providing for increased pay for commissioned warrant officers—Within the meaning of the act of August 29, 1916 (39 Stat. 578), "creditable record" does not import distinguished records but requires only that a record be such that upon examination for promotion it would be found satisfactory. In passing upon the creditability of an officer's record in these cases, consideration should be given to all matters therein disclosed, whether pertaining to his mental, moral, or professional qualifications, and it is necessary that an officer be satisfactory in all these respects if his record is to be deemed creditable. Further, in determining whether the record of a commissioned warrant officer is creditable, the investigation should ordinarily be limited to the scrutiny of his record in his present grade and his prior record in the service should not be taken into consideration except in the cases where under existing law this would be done in determining his fitness for promotion. And, when a commissioned warrant officer has the necessary length of service and it has been decided by the department that his record is creditable, this definitely fixes the rate of pay and allowances to which he is entitled under the above statute, and, in the event of his record ceasing to be creditable, the same can not be affected except by means of disciplinary action as in the case of all officers. (File 17789-27, J. A. G., Sept. 21, 1916; C. M. O. 33, 1916, 6.)

CREDIBILITY.

1. **Manner of introducing in evidence the fact of conviction of crime**—"A conviction of crime is properly proved by the record or a properly authenticated copy thereof, and in the absence of any controlling statute on the subject, the record is the only competent evidence of the conviction; and parol evidence is not competent for that purpose if objected to. But modern statutes very generally allow the witness to be cross-examined as to conviction of crime; and, if he admits his conviction, this is sufficient and the production of the record is not necessary. (40 Cyc. 2640.) (G. C. M. Rec. No. 31998; C. M. O. 16, 1916, 8.)
2. **Of witnesses.** *See* WITNESSES.
3. **Testimony of witnesses**—As a general rule, the uncontradicted testimony of a witness who is not impeached should be accepted as establishing the point concerning which such testimony is given, where it is not in itself improbable, and only in exceptional cases should such testimony be rejected. (C. M. O. 9, 1916, 7.)
4. **Witness having been convicted of an offense involving moral turpitude**—It may be stated as the weight of modern authority that "the fact that a witness has been convicted of crime may be brought out as bearing on his credibility, where the crime amounts to a felony, or is infamous in its nature, and involves moral turpitude. But it is usually held that a witness is not to be discredited by showing his conviction of a mere misdemeanor, or minor offense not involving moral turpitude, or infamous in its nature" (40 Cyc. 2607). The department does not consider that a conviction of a strictly military offense, such as "having clothing in lucky bag," could be introduced in evidence for the purpose of discrediting a witness. But it does not accept the contention of a judge advocate that the offense of "having unlawful possession of the clothing of another" is a strictly military offense in the same category as the example given above, but on the contrary, considers that this latter offense is not essentially military in its character and that it does involve a certain degree of moral turpitude. (G. C. M. Rec. No. 31998; C. M. O. 16, 1916, 8.)

CRIMINAL INTENT.

1. **Not shown.** *See* NEW TRIAL.
2. **Under a charge of stealing property**—The contention of an accused, charged with stealing Government property, that he has appropriated the property in question in good faith as the equivalent of a sum he has previously contributed out of his personal funds to make good a supposed shortage in accounts which did not in fact exist, does

not negative the criminal intent necessary to sustain the charge, even though such contention is supported by the evidence. While there is authority for holding that when a person takes goods in the bona fide belief that he has a claim thereto, whether he has any claim either in law or in fact, the felonious intent necessary to constitute a crime is lacking, yet in order to benefit from this principle of law, it is necessary that the claim under which a party acts must be claim of ownership or right to possession to the specific thing, the appropriation of which is charged. (18 A. and E. Encyclopedia of Law, pp. 523, 524; G. C. M. Rec. No. 35291; C. M. O. 72, 1917, 16.).

CRITICISM OF COURTS-MARTIAL. (C. M. O. 9, 1921, 11.)

CRITICISM OF COURTS.

1. **Convening authority**—Criticizes a court composed of officers of rank and experience for adjudging a sentence involving public reprimand, and adhering to such sentence after its attention had been directed to the fact that such sentences were in total disregard to the department's clearly established policy in regard thereto. (C. M. O. 225, 1919; G. C. M. Rec. No. 43939.)

CRITICISM OF COURT-MARTIAL.

1. **Finding the fact and applying the law**—A comprehensive knowledge of this subject (law) is a profession in itself, and while officers of the naval service are accountable for the information promulgated by court-martial orders and other official publications, it is to be expected that cases will arise in which naval courts will require assistance in applying the more intricate provisions of law. Therefore, if by reason of a lack of knowledge of the law a court arrives at an incorrect finding or unjustified sentence there has been provided, in the interests of justice, a means of correcting such error. The department may return the record for further consideration, pointing out what the law is and how it should be applied. In such event, the court is not justified in disregarding the law because an application of the same may reach a result at variance with the individual beliefs of a majority of its members. It is only right and just for the court to accept the law as laid down to it by proper authority and then to come to the findings and sentence anew accordingly. (C. M. O. 25, 1916, 4).
2. **Finding the fact and applying the law**—It is not the desire or the policy of the department to coerce courts-martial in their judgment of cases when the facts are in dispute, or where there is such a conflict in the evidence that reasonable men might differ as to the facts established thereby. But when there is no conflict whatever in the evidence, all material allegations of the specification being established thereby, and the only difficulty existing is one of law, a different question is presented. Under such circumstances, courts-martial are to be governed by decisions of the Federal courts, opinions of law officers of the Government, and decisions of the department. (C. M. O. 25, 1916.)
3. **Improper use of specification for trial in joinder**—A specification intended for the use of a trial in joinder was improperly used for the trial of a single accused. *Held*, "As, however, both participants are charged with the offense it necessarily follows that each is so charged, and in view of this fact, though admittedly irregular, the specification was held not fatally defective." (File 26262–3982, J. A. G. 11 Mar., 1918; G. C. M. Rec. No. 36895; C. M. O. 30, 1918, 21.)

CROSS-EXAMINATION.

1. **Evidence tending to proof of corpus delicti**—Duty of judge advocate to subject it to the usual tests of. (C. M. O. 224, 1919.)
2. **Improper.** (C. M. O. 12, 1921, 7.)
3. **Scope of when accused takes stand as a witness in his own behalf.** (C. M. O. 11, 1921, 8.)

CULPABLE.

1. **Definition of.** (C. M. O. 6, 1921, 11.)

CUSTOM.

1. **Elements necessary to establish**—The principal conditions to be fulfilled in order to constitute a valid custom are: (*a*) It must be long continued; (*b*) it must be certain and uniform; (*c*) it must be compulsory; (*d*) it must be consistent; (*e*) it must be general; (*f*) it must be known; (*g*) it must not be in opposition to the terms and provisions of a statute or lawful regulation or order. (Naval Courts and Boards, 1917, p. 9.) (File 26251–25288, 2 Nov. 1920; G. C. M. Rec. No. 50017; C. M. O. 133, 1920, 11.)

"CYCLOPS."

1. **Date of loss of**—As affecting policy of insurance. **(C. M. O. 114, 1919, 20.)**

DEATH.

Presumptive—Time necessary before certificate of, issued—The Major General Commandant, U. S. Marine Corps, requested the opinion of the Judge Advocate General as to whether, in the case of marines serving overseas with the American Expeditionary Forces who have been reported missing in action or who have been unaccounted for during a period of over six months since the cessation of hostilities, they may be carried officially on the records as dead and certificates of presumptive death may be issued to the Auditor for the Navy Department, Bureau of War Risk Insurance, insurance companies, etc.

It was stated that after efforts made by the Army authorities abroad to locate all missing men, there remained on a certain date 262 marines unaccounted for; and a letter dated 14 May, 1919, from the Compensation and Claims Division of the Bureau of War Risk Insurance, relative to the case of a certain marine who was reported wounded in action and missing 6 June, 1918, and ever since unaccounted for, was quoted, in part, as follows:

"In view of the extremely long period over which he has been reported missing, we are wondering whether it is not possible for your office to take action similar to that of The Adjutant General's office in cases of this kind. It is their practice to assume death after a period of six months, when official report is furnished this office."

The Judge Advocate General rendered the following opinion:

"The action of The Adjutant General's office, above referred to, is predicated on an opinion dated 4 April, 1918, of the Judge Advocate General of the Army, holding as follows:

"*Presumption of death in case of officer or soldier reported 'missing' in action or in disaster at sea.*—When a man is last known of as going into action and has been reported as 'missing in action' and when sufficient time has thereafter elapsed so that a report of him would have been received through the Red Cross or other recognized channel in case he has been taken prisoner, and there is still no information as to his existence or whereabouts, the only reasonable presumption, in view of present conditions and methods of warfare, is that he is dead. Consequently, where a man is reported as 'missing in action,' and reasonable efforts to locate him, made through regular channels, have proved unsuccessful, after a lapse of a reasonable time the records of The Adjutant General should carry the man as dead, and the rights of his beneficiaries to compensation and insurance should be settled on that basis. What constitutes such reasonable time is a question of fact in each case, but it would be an extraordinary case where such reasonable time would exceed six months. Similarly the officers and enlisted men on the *Tuscania* when she was torpedoed, who were reported missing after the disaster and who have remained unaccounted for for two months thereafter, should be recorded as dead on the records of The Adjutant General, since there is every reasonable probability that none of such persons have survived."

Upon the question of presumptive death this department has heretofore decided, in a specific case where a submarine, known to contain persons in the naval service, sank and remained submerged about two and one-half months, that said persons were dead and that the necessary steps should be taken without further delay to pay the death gratuity authorized by law to their beneficiaries. (File 26453–137, Sec. Navy, 17 June, 1915; C. M. O. 22, 1915, 7.)

"In the matter submitted by you it is quite probable that in many instances the immediate families or dependent relatives of the marines, above referred to as being unaccounted for, are suffering a hardship through the delay in the adjudication on any claims they may have on account of the death of these marines, and it is in their interest as well as that of the Government that definite action be taken along the lines pursued by the War Department, as indicated above. I am, therefore, of opinion that where a marine is last known as going into action and is thereafter reported as missing in action and reasonable efforts made to locate him, made through regular channels, have proven unsuccessful after the lapse of at least six months, the records should carry such marine as dead, and the certificate of presumptive death should be issued to the Auditor for the Navy Department, Bureau of War Risk Insurance, insurance companies, etc. Care should, of course, be exercised so as not to report deserters as presumptively dead, and for that reason it is essential to ascertain definitely in each case whether the given marine was last known of as going into action and thereafter reported as missing in action. Cases not coming within the foregoing rules should be considered separately on their merits and action thereon will be dependent upon the evidence available. (File 11112–1320, J. A. G., 21 May, 1919; C. M. O. 183, 1919, 32.)

DEATH GRATUITY.

1. **Payment to be made immediately**—In death gratuity cases, when the right of a beneficiary has been established to the satisfaction of the Paymaster General of the Navy, and he has authorized payment by the proper disbursing officer, such payment will be made by said officer *immediately* as required by law unless the authorization is for any reason revoked by the Paymaster General of the Navy before payment can be accomplished. (File 26543–14 8:5, Sec. Navy, 29 May, 1916; C. M. O. 16, 1916, 9.)
2. *See also* COAST GUARD.

DEBTS.

1. **Officer**—Dishonorable indifference to, constituting "Conduct unbecoming an officer and a gentleman." (C. M. O. 59, 1919.)
2. **Officer**—Failure to pay, fairly presumed to emanate from dishonorable indifference. (C. M. O. 59, 1919.)

DECEIT. *See* FRAUD.

DECISIONS AND OPINIONS.

Distinguished—When the Judge Advocate General renders an opinion, he states his inference or conclusion of what, in contemplation of law, would or should follow from a given state of facts, and where an opinion of the Judge Advocate General is received it may be followed or not in the judgment of the person whose duty it is to act in the premises.

A decision is a ruling, or command, that certain things shall follow from a given state of facts, and departmental decisions are made by the head of the department. Where a decision has been rendered in any case by the Secretary of the Navy it is an authoritative ruling or instruction which has all the force and effect of an order or command. (File 13673–3897, J. A. G., 31 Oct., 1916; C. M. O. 37, 1916, 6.)

DECK COURTS.

1. **May be convened by officers of the National Naval Volunteers.** *See* ADMINISTRATION OF NAVAL DISCIPLINE.
2. **Order convening court must be signed.** (C. M. O. 11, 1921, 12.)
3. **Revision.** *See* REVISION.
4. **Specification.** (C. M. O. 5, 1921, 13; C. M. O. 6, 1921, 11.)

DECORATIONS OF FOREIGN GOVERNMENTS.

May not be worn—A person in the naval service of the United States may not wear "publicly exposed upon his person" a foreign decoration conferred upon him prior to his entry into such service. (File 19245–57, Sec. Navy, 19 Sept., 1917; C. M. O. 58, 1917, 11.)

DECORATIONS, FOREIGN. *See* GIFTS.

DEFECTIVE. Specification. (C. M. O. 5, 1921, 12.)

DELICTUM.

1. **Legal character of.** *See* CHARGES AND SPECIFICATIONS—Multiplicity.
2. **Nonpayment of debts**—Regarded as. (C. M. O. 255, 1919.)

DENTAL CORPS.

Promotion—The act of 29 August, 1916, does not, of its own vigor, vest in an acting assistant dental surgeon, appointed under the act of 22 August, 1921, the office of dental surgeon (permanent) with the right of advancement to the rank of lieutenant after five years service (including service as an acting assistant dental surgeon). The power of appointment was left where it would have been without the specific provision made in this case, namely, in the President. (File 13707–65:1, Sec. Navy, 19 Oct., 1917; C. M. O. 67, 1917, 16.)

DENTAL SURGEON.

1. *See also* MEDICAL CORPS.
2. **Acting assistant dental surgeon as member of summary or general court-martial.** *See* MEMBER OF COURT-MARTIAL.
3. **Appointment of a chief pharmacist's mate**—A properly qualified chief pharmacist's mate may be temporarily appointed a dental surgeon with the rank, pay, and allowances, of lieutenant (junior grade) in accordance with the provisions of the act of May 22, 1917. (File 27213–12, J. A. G., July 20, 1917; C. M. O. 46, 1917, 21.)

DEPOSITIONS.

1. **Limitation of sentence when introduced.** *See* SENTENCE.
2. **Party securing may decline to introduce same as evidence**—At the request of the accused, the department had directed that the deposition of a certain enlisted man be taken. After the deposition was taken the accused discovered that its contents were against his interests and at the trial declined to introduce it in evidence. Thereupon the judge advocate attempted to introduce the deposition in evidence and upon objection being made by the accused the court sustained the objection. *Held*, That the action of the court was proper. The law gives the accused the right to cross-examine a witness testifying against him and of this right he should not be deprived. If the judge advocate desired the testimony of the witness in question to be introduced for the prosecution, the proper procedure would have been for him to secure an entirely new deposition, in which case the accused would prepare the cross-interrogatories, instead of the judge advocate. In cases like the above where the party taking the deposition has been taken by surprise the court should allow the opposite party, if he desire time to secure another deposition from the deponent. (File 26251-11382, Sec. Navy, Feb. 25, 1916; G. C. M. Rec. 31728; C. M. O. 5, 1916, 5.)
3. **Where not necessary in proof of all the charges, a dismissal based on the remainder is proper.** (C. M. O. 255, 1919.)
4. **Weight as evidence.** *See* WEIGHT OF EVIDENCE.

DEPOSITS.

1. **Enlisted man having an acting appointment as warrant officer**—The status of such man pending the issuance of a warrant continues that of an enlisted man, although at the same time acting as a warrant officer, and he is therefore entitled to draw interest on deposits or to make additional deposits in accordance with the act of February 9, 1899 (25 Stat. 657). The deposit should be settled on the date that he is given a warrant and interest allowed to that date, unless previously discharged. (File 26254-2020, Sec. Navy, June 6, 1916; C. M. O. 17, 1916, 10.)
2. **Enlisted men temporarily commissioned as officers**—In cases of enlisted men temporarily advanced to the grade of warrant or commissioned officers under the provisions of the act of 22 May, 1917, their deposit accounts should be closed and they should be paid principal and interest thereupon to, but not including, the date that they received such appointment. (File 26524-2020; 1, Sec. Navy, July 13, 1917; C. M. O. 46, 1917, 21.)

DESERTER.

1. **Applicant refusing to take oath of allegiance**—A man who signs the shipping articles, is furnished and accepts transportation, is passed by a medical officer, is furnished and accepts clothing and subsistence, and is actually assigned to duty, becomes legally, and for all purposes, an enlisted man of the Navy despite his refusal to take the oath of allegiance (C. M. O. 32, 1917, 6). Therefore, if upon fulfillment of the above conditions a man fails to report for duty when properly ordered to do so, and does not report for a period of 10 days he shall, at the end of such period, be declared a deserter (art. 3632 (2), Navy Regulations, 1913). On the other hand, the mere signing of the shipping articles by an applicant for enlistment without the fulfillment on the part of the naval authorities of the other conditions above set forth would not make such applicant an enlisted man in the Navy, nor could he, under such circumstances, be declared a deserter for failure to report in order that the naval authorities might fulfill the conditions mentioned. (C. M. O. 48, 1920, 28.)
2. **Minor having enlisted fraudulently; amenability to trial by general court-martial**—An enlisted man who was a minor fraudulently enlisted by making oath to a false date of birth, and it appears, further, that his consent papers were signed by one X, who made oath that he was the grandfather of the man and his sole legal guardian, when in fact Y, the father of the recruit, was and always has been, his legal guardian. Subsequently the man deserted and the question involved is the amenability of the man to trial by general court-martial, having in view his minority and fraudulent enlistment. The law applicable is as follows: "Minors between the age of fourteen and eighteen years shall not be enlisted for the naval service without the consent of their parents or guardian." (Sec. 1419, Revised Statutes, as amended.) "When it is afterwards found upon evidence satisfactory to the Navy Department that the recruit has sworn falsely as to age, and is under eighteen years of age at the time of enlistment, he shall, on request of either parent, or, in case of their death, by the legal guardian, be released from service in the Navy upon payment of full costs of

first outfit, unless in any given case the Secretary, in his discretion, shall relieve said recruit of such payment." (Act of Mar. 4, 1913, 37 Stat. 894; reenacted Mar. 3, 1915, 38 Stat. 931.) From a careful consideration of the foregoing provisions of law and the facts as above set forth, it is the opinion of the Judge Advocate General that the man is not discharged by his fraudulent enlistment from the criminal liability incurred through desertion, and that the enlistment of a minor without the consent of his parents or guardian, either where he has made false representations as to age or where some one other than his parent or legal guardian has acted in their place without proper authority, while valid as to the minor is voidable at the instance of a parent or guardian, and upon application of parent or guardian the civil courts will by habeas corpus proceedings direct the immediate discharge of a minor, except in those cases where disciplinary action has been commenced by the naval authorities, at least until he has answered and satisfied the charges pending against him. (Naval Courts and Boards, p. 84; U. S. *v.* Reaves, 126 Fed. Rep. 127; Dillingham *v.* Booker, 163 Fed. Rep. 696; 16 Ann. cas., 127; Ex parte Rock, 171 Fed. Rep. 240; *see also* Solomon *v.* Davenport, 87 Fed. Rep., 318; In re Lessard, 134 Fed. Rep. 305; In re Scott, 144 Fed. Rep. 79). (File 26516–324; J. A. G. 2 Dec., 1919; C. M. O. 321, 1919, 14.)

3. **Apprehension of; procedure**—In answer to a request for information whether a warrant is necessary to arrest a deserter in one State and bring him to another State for delivery to the naval authorities, the Judge Advocate General expressed the following views:

"By the inclosed indorsement you request such information as will enable you to make reply to the accompanying request of the Federal detective bureau, Paterson, N. J., for a ruling from the naval authorities as to whether a warrant is necessary to arrest a deserter in one State and bring him to another State for delivery to the naval authorities.

"Section 15 of the act of 16 February, 1909 (35 Stat. 622), authorizes the arrest of deserters from the Navy by 'any civil officer having authority under the laws of the United States, or of any State, Territory, or district, to arrest offenders.' Outside of his jurisdiction a civil officer has no authority to make arrests, but becomes a mere private citizen, and is not, outside of his jurisdiction, a civil officer, in the meaning of the above act. This office has, accordingly, held that the authority of civil officers to arrest deserters must be coextensive with their a thority to arrest other offenders; that the one can not exist without the other; and that when a civil officer leaves his jurisdiction and loses his power to arrest offenders against the civil laws he at the same time loses his power to arrest deserters from the naval service. (File 26516–218, J. A. G., 24 Aug., 1916.)

"It necessarily follows from the above that inasmuch as a civil officer has no legal authority to transport an offender against the civil laws from the State in which such offender is arrested to another State for trial without first procuring a warrant of rendition, he, as a civil officer, acquires no greater authority under the above act of 16 February, 1909, with regard to the transportation of deserters to a State other than that in which such deserter is arrested.

"The proper procedure to be pursued by a civil officer after he arrests a deserter is to deliver him to the proper naval authorities within the State of his jurisdiction, and the naval authorities will then take the necessary steps to transfer the deserter to the place where he is wanted." (File 26516–317, J. A. G., 11 Aug., 1919; C. M. O. 26S, 1919, 13.)

4. **Surrender and delivery at recruiting station**—Paragraph 5 of the notes, General Order 110 (revised July, 1916), was canceled, and recruiting stations were authorized, under such instructions as may be issued by the Chief of the Bureau of Navigation and the Major General Commandant of the Marine Corps, to accept the surrender or delivery of stragglers or deserters and to furnish them the necessary transportation and subsistence. (File 26516–144: 65, Sec. Navy, 5 Jan., 1918; C. M. O. 4, 1918, 20.)

5. **What constitutes surrender**—The term "surrender" as used in connection with the return of a straggler or alleged deserter refers to his surrender to a naval authority only. The burden rests upon the deserter or straggler to effect his own return to duty or to the custody of such naval authority as may have been authorized to receive him. (C. M. O. 37, 1917, 17.)

DESERTION.

1. *See also* DISMISSAL.
2. **Absence from United States as affecting statute of limitations—Pardon**—With regard to a person who deserted from the United States naval service in July, 1915, and who enlisted in the Canadian Army in 1916, served three years abroad, and has just been discharged, the department holds that such person is in the status of a deserter at large, and is still subject to apprehension and trial by general court-martial, as under the above-quoted article the time of his absence from the United States is excluded in computing the period of limitation during which he may be tried. Further, that under the rules of the Department of Justice, as approved by the President, no application for pardon in any given case of desertion will be considered until the offender has been convicted thereof, and that it is also not the policy of this department to recommend the pardon of a deserter at large. (File 26516–307: 1, Sec. Nav., 6 Aug., 1919; C. M. O. 268, 1919, 13.)
3. **An officer was convicted five years subsequent to his offense and the preferring charges and specifications**—A naval officer deserted in 1912 and was tried and convicted in 1917 on charge and specifications preferred against him in 1912. The court sentenced him to be dismissed but the department set aside the sentence and released him from arrest on the ground that he had ceased to be a member of the naval service on the date his successor was appointed by the President with the advice and consent of the Senate. (C. M. O. 26, 1917.)
4. **Certain documents insufficient to prove**—In an endeavor to prove desertion the prosecution in a recent case introduced no evidence other than two documents purporting to relate to the accused, a member of the United States Coast Guard, one a report, presumably from the commanding officer of the ship on which the accused served, addressed to the captain commandant, United States Coast Guard advising him that the accused was declared a deserter, as he had been on unauthorized leave since 3 May, 1918, had failed to communicate with his vessel, and that every endeavor had been made to apprehend him without result; the other was the usual report of deserter received on board, addressed to the Bureau of Navigation.

   The above-mentioned evidence was held to be incompetent to prove the beginning of the accused's absence, and therefore necessarily there was no competent evidence before the court as to the duration of the accused's absence, from which it might infer the intent of the accused to permanently abandon the naval service, which intent is an essential element of "desertion." (File 28762–11: 174; G. C. M. Rec. No. 160; C. M. O. 77, 1919, 15.)
5. **Conviction of, committed in time of war, must carry with it the sentence of dishonorable discharge**—Sections 1996 and 1998, Revised Statutes, as amended by the act of 22 August, 1912; Navy Regulations, 1913, Article R–3644, provide that persons who are convicted of desertion from the naval service in time of war are incapacitated from holding any office of trust or profit under the United States or from exercising any rights of citizenship thereof. It therefore follows that such a person can not be retained in the United States naval service and in all such cases the sentence of a general court-martial should include dishonorable discharge. (File 26251–25364, 1. Nov., 1920. G. C. M. Rec. No. 49933; C. M. O. 151, 1920, 12.)
6. **Defined for the Coast Guard by Navy Regulations**—The Navy Regulations are controlling in determining at what time a straggler from the Coast Guard in time of war should be regarded as a deserter; accordingly, such a straggler is to be considered a deserter after the tenth day of his unauthorized absence. (File 28762–136, J. A. G., July 7, 1917.) It is noted however, that one absent without leave, with a manifest intention to desert, should be regarded as a deserter, and the necessary action should be taken forthwith. (C. M. O. 46, 1917, 21.)
7. **Effect of pardon on the question of reentrance in the service**—An enlisted man who has incurred the penalties prescribed by section 1998, Revised Statutes, and section 1996, Revised Statutes as amended by the act of 22 August, 1912, and who has been pardoned, is eligible to hold an office of trust or profit in the Navy or to serve as an enlisted man in the Navy in so far as ineligibility in the absence of a pardon depends upon these sections of the Revised Statutes as amended. But it was so held that a person who has deserted in time of war from the naval or military service of the United States is not eligible after pardon, for reenlistment in the naval service, in view of the provisions of sections 1420 and 1628 of the Revised Statutes, as amended by the act of 22 August, 1912. (File 26282–326: 2, 15 Feb. 1918; C. M. O 15, 1918, 16.)

8. **Essential elements of the offense.** (C. M. O. 304, 1919, 14.)
9. **In time of war.** *See* DISHONORABLE DISCHARGE.
10. **In time of war: Jurisdiction of court-martial.** *See* JURISDICTION.
11. **In time of war**—Must carry with its conviction the sentence of discharge. And where a convening authority mitigates the sentence, of an accused so convicted, in accordance with articles 114 to 122 of the Manual for the Government of the United States Prisons and Detention Systems, it was held that that portion of his action was without effect. Sections 1996 and 1998, Revised Statutes, as amended by the act of 22 August, 1912 (37 Stat. 356), (Naval Regulations, 1913, R-3644), provide that persons who are convicted of desertion from the naval service in time of war are incapacitated from holding any office of trust or profit under the United States, or from exercising any rights of citizenship thereof, by virtue of the fact that a prisoner, whose sentence is mitigated in accordance with articles 114 and 122 of the prison manual, may usually earn his restoration to duty in the naval service, it is obvious that a mitigation of sentence for the offense described is a nullity. (C. M.O. 114, 1919, 14; File 26262-7558, J. A. G., 23, June 1920; C. M. O. 85, 1920, 13.)
12. **In time of war**—One convicted of, may not be retained in service. (C. M. O. 280, 1919, 10.)
13. **Involuntary**—One driven by fear to leave station is not guilty of desertion. (C. M. O. 92, 1918, 15; File 26251-16894, G. C. M. Rec. No. 38939.)
14. **Limitation of the offense**—"This engagement (contract of enlistment) binds the soldier for a specific term of service, beginning at a certain time and running thence continuously day after day until the end is reached, the last day of the term being as much fixed by the contract as the first. * * * Thus it seems that in our military service the contract of enlistment must in all cases, even in that of desertion, be regarded as having expired when the last day of the term of enlistment therein fixed has elapsed. And since the obligation to serve depends upon the contract, and necessarily ceases therewith, the offense of desertion, on grounds already set forth, must be deemed to terminate at the same time. In short, that offense may be viewed as continuing up to the end of the term of his engagement, but not beyond." (15 Op. Atty. Gen. 161, 162; C. M. O. 17, 1916, 6. But see C. M. O. 4, 1922, 11.)
15. **Loss of citizenship by conviction of**—Procedure to restore citizenship. (C. M. O. 280, 1919, 12.) *See* CITIZENSHIP.
16. **Mark of**—Not removed in case of deserter's death in action; facts of such death entered on record. (C. M. O. 77, 1919, 23.)
17. **Removal of mark of**—Can not be done except in case of error. (C. M. O. 39, 1919, 23.)
18. **Specification under charge of—Must allege desertion from the navy**—A specification which alleges that the accused deserted from a certain ship and remained a deserter until he surrendered on board another ship and which does not further allege that he deserted from the United States Navy, is not sufficient to sustain a charge of desertion. (*See* C. M. O. 49, 1910, 9.)

The very essence of the military offense of desertion is the unauthorized absence of the accused with the intent permanently to abandon the naval service or to cancel the pending contract of enlistment. (File 26251-17117, G. C. M. Rec. No. 39093; C. M. O. 141, 1918, 25.)

DETACHED DUTY.

Power of immediate commanding officer to punish. *See* ENLISTED MEN.

DISAPPROVAL.

1. **Charge and specification thereunder**—Specification not sufficient to allege an offense. (C. M. O. 227, 1919.)
2. **Findings**—Because evidence adduced not sufficient to support. (C. M. O. 116, 1919.)
3. **Findings and sentence**—Accused charged with absence from station and duty without leave; findings not supported by evidence adduced; illness as a defense (C. M. O. 39, 1919, 17.)
4. **Gross or culpable negligence not established beyond reasonable doubt.** (C. M. O. 243, 1919.)
5. **Ground for**—Failing to prove case beyond a reasonable doubt. (C. M. O. 90, 1919.)
6. **Ground for**—Member of court had, prior to trial formed an opinion as to guilt of accused. (C. M. O. 109, 1919.)
7. **Libel**—Specification failed to allege and evidence adduced did not prove that the communication containing the libelous matter was published. (C. M. O. 39, 1919.)
8. **Proceedings, findings and sentence**—Disapproved in lieu of granting a new trial; exigencies of the service. (C. M. O. 109, 1919.)

9. **Proceedings, in revision**—Disapproval by convening authority; only four members of court present at session in revision. (C. M. O. 239, 1919.)
10. **Sentence**—Accused plead guilty to charge of absence from station and duty after leave had expired and was acquitted of the charge of "Drunkenness," evidence shows such extenuating circumstances that punishment for the technical absence without leave being unnecessary, department disapproved the sentence of dismissal, the acquittal of the charge of "Drunkenness" removing the seriousness from the charge of absence over leave. (C. M. O. 58, 1919.)

DISBARMENT OF OFFICER.

As a member of court, judge advocate, or counsel—Attention is also invited to the seemingly improper action on the part of the convening authority in wiring the detachment commander that with the new charge and specification an order would be forwarded directing that Captain ——— (counsel for the accused) be not allowed to act in any general court-martial case either as judge advocate, counsel, or member. Such action might have the effect of discrediting counsel for the accused in the eyes of the court and prejudicing the case of the accused. Besides it has been ascertained that the disbarment of Captain ——— from court-matrial duty was without investigation or hearing and for no cause that was communicated to Captain ——— either before or after his disbarment. (C. M. O. 300, 1919, 3.)

DISBURSING OFFICER.

Responsibility for overpayment by pay clerk. *See* PAY CLERK.

DISCHARGE.

1. *See also* LINE OF DUTY.
2. **Acting appointment and temporary appointment distinguished**—An acting pay clerk was appointed as such from the enlisted personnel of the Navy on 29 December, 1916. He requested to be informed as to whether or not he was entitled to honorable discharge from the Navy upon 12 September, 1917, the date that his enlistment would have expired had he continued an enlisted man. The grade of acting pay clerk is a permanent institution in the Navy. It was created by the act of 3 March, 1915 (38 Stat. 928, 942), and must not be confused with temporary appointments which are issued under the authority of the act of 22 May, 1917. It was held that his enlistment had ipso facto terminated upon his accepting the appointment to the permanent office of acting pay clerk in the Navy and that he was not entitled to an honorable discharge on 12 September, 1917, and that he should not be given a discharge from said enlistment. (File 26254-2020:4, J. A. G., 15 Mar., 1918; C. M. O. 30, 1918, 24.)
3. **Character given**—Can not be changed later, in the absence of a mistake of law or fact. (File 7657-885:1, J. A. G., 21 June, 1920; C. M. O. 85, 1920, 13.)
4. **Effect of delivery**—Where an honorable discharge has once duly taken effect by the delivery of the formal certificate, it is final and can not be revoked unless obtained by fraud. (File 26251-25789, 3 Dec., 1920; G. C. M. Rec. No. 50679; C. M. O. 151, 1920, 12.)
5. **Effective moment of discharge**—Upon the expiration of an enlistment the effective moment of discharge is midnight of the last day of the contract; and the delivery of a discharge certificate, that is, the evidence of discharge, at an earlier hour does nor effect the fact of discharge. (File 27381-31, Sec. Navy, Feb. 5, 1917; C. M. O. 15, 1917, 10.
6. **Effective moment of discharge**—Upon a discharge with an undesirable discharge the effective moment is that of the delivery of the discharge certificate. (File 26254-70, Sec. Navy, 8 July, 1908; C. M. O. 15, 1917, 11.)
7. **Mistake in date of**—Not sufficient to vitiate. (C. M. O. 77, 1919, 19.)
8. **Rights under**—A soldier honorably discharged in the usual form at the end of his term is no longer subject to military discipline or control. Having become a civilian, he is entitled to be restored at once, or as soon as the exigencies of the service will permit, to the rights and status of a civilian. (File 26251-25789, 3 Dec., 1920; G. C. M. Rec. No. 50679; C. M. O. 151, 1920, 12.)
9. **Within three months of expiration of enlistment**—An enlisted man may be discharged within three months of the date of the expiration of his term of enlistment plus any time lost through sickness or injury, the result of his own misconduct. (File 7657-394:29, Sec. Navy, 27 Sept., 1920; C. M. O. 119, 1920, 15.)

DISEASE.

Medical officers are not responsible to State authorities—Neither naval medical officers nor persons in the Medical Corps of the Navy may be required by State officials to furnish information to said officials concerning the physicial condition as to communicable diseases of candidates for enlistment in the Navy, or of those discharged from the naval service even though discharged by reason of such disease. (File 7657-458:1, J. A. G., 13 Dec., 1917; C. M. O. 88, 1917, 16.)

DISCIPLINE.

Nurse Corps (Female). *See* NURSE CORPS (FEMALE).

DISCIPLINARY ACTION.

Against members of court-martial on account of the findings or sentence of the court. *See* MEMBERS OF COURT-MARTIAL.

DISCIPLINARY FEATURES.

Marine Corps cases—Province of office of Major General Commandant to comment upon. (C. M. O. 116, 1919.)

DISCREPANCY IN DATE OF PRECEPT AND LETTER TRANSMITTING CHARGES AND SPECIFICATIONS.

Not sufficient to invalidate proceedings. (C. M. O. 279, 1919; G. C. M. Rec. 44458.)

DISCRIMINATION AGAINST UNIFORM.

Virginia—Discrimination against uniform is prohibited by statute in Virginia. (C. M. O. 9, 1916, 19.)

DISHONORABLE DISCHARGE.

1. **Effect upon citizenship**—Dishonorable discharge from the naval service of the United States inflicted by reason of conviction of an offense other than that of "desertion in time of war" is not attended with loss of right of citizenship under the laws of the United States. Whether or not such discharge affects the loss of the individual's right of citizenship in the State is a matter depending on the laws of that particular jurisdiction. (File 28798-6, J. A. G., 11 June, 1917; C. M. O. 37, 1917, 12.)
2. **In time of war does not carry with it loss of citizenship, except for desertion.** (C. M. O. 30, 1920, 2.)
3. **Officers**—Sentence involving reduction to enlisted rating and dishonorable discharge (C. M. O. 185, 1919.)

DISMISSAL.

1. **Conduct unbecoming an officer and a gentleman.** *See* ARMY, 1.
2. **Drunkenness on duty**—Officer convicted of, should be dismissed. (C. M. O. 67, 1902, 2.)
3. **Effect of, as to reinstatement**—Section 1441 of the Revised Statutes is as follows:

   "No officer of the Navy who has been dismissed by a sentence of court-martial, or suffered to resign in order to escape such dismissal, shall ever again become an officer in the Navy."

   The Attorney General on 15 February, 1918, stated that in his opinion an officer who has been dismissed from the service by sentence of court-martial, or suffered to resign in order to escape such dismissal, can not again become an officer of the Navy, even though he should be pardoned by the President for the offense for which dismissed. (File 26262-5846:3, J. A. G., 18 June, 1919; C. M. O. 209, 1919, 21.) (*See also* PARDON (UNCONDITIONAL), etc.)
4. **Former officers of Naval Reserve Force.** *See* SENTENCE.
5. **Notation on record**—In cases involving dismissal the convening authority should note on record the reference of same to Secretary of the Navy for transmission to the President. (C. M. O. 4, 1917, 2.)
6. **Not effective**—Where the accused deserts prior to the receipt of the letter promulgating the confirmation of the sentence, or the publication of the court-martial order. The accused is still an officer, subject to apprehension and trial by general court-martial for desertion. (C. M. O. 60, 1920, 14.)
7. **Not operative as to an enlisted man who has ceased to be a warrant officer**—A warrant officer in the Marine Corps holding a temporary appointment was tried by general court-martial, sentenced to dismissal, and the sentence was confirmed, but prior to its confirmation his temporary warrant was revoked and he reverted to his enlisted status as a quartermaster sergeant. Information being requested as to whether the sentence of dismissal could be accomplished in view of his change of status, the department expressed the following views thereon :

"The sentence of the court was as follows: 'The court therefore sentences him, Quartermaster Clerk ——, U. S. Marine Corps, to be dismissed from the United States naval service.' I do not see how a sentence of dismissal can apply to the present rank of Quartermaster Sergeant ——. The sentence of the court was that Quartermaster Clerk —— should be dismissed from the naval service, but —— ceased to be a quartermaster clerk on 23 August, 1919. by his demotion to an enlisted status, before the sentence of the court was confirmed and made effective. By his demotion he ceased ipso jure to hold the office to which alone the sentencd related. (*See* 4 Op. Atty. Gen. 8.)

"The department accordingly held that the dismissal adjudged by the general court-martial against one who is a warrant officer is inoperative against that same person when his status changes to that of an enlisted man. It held further, however, that if the man's record warranted he might be discharged for the good of the service, giving him an ordinary discharge." (File 26251-21153:3, J. A. G., 23 Oct., 1919; C. M. O. 296, 1919, 12.)

8. **Officer**—Dismissed by sentence of general court-martial for failing to pay his debts. (C. M. O. 15, 1916.)
9. **Sentence based on deposition**—An officer was sentenced to dismissal. The judge advocate, in order to prove the offenses alleged in the charges and specifications, introduced, in behalf of the prosecution, a deposition obtained from a witness for the prosecution whose presence before the court the exigencies of the service rendered it impractical to obtain. *Held*, the department does not consider it desirable, as a matter of policy, to approve a sentence calling for the dismissal of an officer in a case where a deposition has been thus used in securing a conviction. (G. C. M. Rec. No. 31925; C. M. O. 11, 1916, 1–2.)
10. **Sentence**—Involving dismissal of officer held in abeyance for one year with view to final remission. (C. M. O. 74, 1917.)
11. **Sentence of**—Disapproved because a member of the court had, prior to trial, formed an opinion as to the guilt of the accused and therefore could not accord the accused a fair and impartial trial. (C. M. O. 109, 1919.)
12. **Sentence of**—Effect on a status of one who holds both rank and rating. (C. M. O. 280, 1919, 21.)
13. **Sentence of, published in fleet court-martial order**—The finding and sentence of the court-martial providing dismissal were published in Court-Martial Order No. — of ——, Squadron Four. Although such action is prescribed in section 387, Naval Courts and Boards, 1917, exception thereto should be made in cases where the approval of the convening authority does not render the sentence effective, and said section should be amended accordingly. The sentence in this case involved the dismissal of an officer and could not be executed until confirmed by the President. Under such circumstances, the penalty prescribed is not complete, but is merely the judgment of the court, and does not become an effective sentence until confirmed by the President, and therefore should not be published until so confirmed. (C. M. O. 189, 1918, 2; G. C. M. Rec. No. 40918.)
14. **Sentence of**—Should be prior to imprisonment. (C. M. O. 145, 1919.)
15. **Warrant Officer**—Dismissed by sentence of general court-martial for cheating at an examination. (C. M. O. 20, 1916.)
16. **Warrant Officer**—Dismissed by sentence of general court-martial for nonpayment of debts. (C. M. O. 2. 1916.)

DISOBEDIENCE OF LAWFUL ORDER. (C. M. O. 9, 1921, 12.)

DISOBEYING THE LAWFUL ORDER OF HIS SUPERIOR OFFICER.

1. **Drunkenness as a defense**—In Winthrop's Military Law and Precedents (vol. 1, p. 441) it is stated that: "Where a deliberate purpose or peculiar intent is necessary to constitute an offense, as in cases of disobedience of orders, * * * the drunkenness, if clearly shown in evidence to have been such as to have incapacitated the party from entertaining such purpose or intent, will ordinarily properly be treated as constituting a legal defense to the specific act charged." This statement is quoted and applied in C. M. O. No. 86, 1898, digested in two places in Naval Digest, 1916. (*See* Naval Digest, 1916, p. 190 (8), p. 196 (52).)

On the other hand, it has been held by this department that no specific intent is necessary to sustain a charge of disobedience of orders, and accordingly that drunkenness, when voluntary is no defense to such charge. In C. M. O. No. 77, 1906, it was stated: "The department can not concede that intoxication forms any excuse for failure to render prompt and implicit obedience to orders from superior officers."

(*See* Nav. Dig., 1916, p. 195 (38).) Again in C. M. O. No. 5, 1912, it was stated that: "If the Articles for the Government of the Navy be examined, many acts and neglects will be found which are made punishable where only a general intent is necessary; that is where merely doing the act or omitting to do some duty constitutes the offense, the presumption of a general wrongful intent being raised by proof of such act or omission. Some of these are * * * negligent or careless in obeying orders," "Violating or refusing obedience to any lawful general order." * * *

Notwithstanding these later decisions of 1906 and 1912, the department, in C. M. O. No. 50, 1918, reverted to the ruling made in 1898, based on G. C. M. Rec. No. 41933, for the reason that the question of drunkenness in connection with the charge of "Disobeying the lawful order of his superior officer" was not raised or discussed therein. The principle laid down in the * * * case that drunkenness, per se, is not a defense where no specific intent is necessary, is on the contrary reiterated and affirmed. (Op. J. A. G., G. C. M. No. 42618, C. M. O. 208, 1919.) But see C. M. O. 6, 1922, 9.

2. **Drunkenness as a defense**—Drunkenness may be a matter of legal defense in so far as it affects the capacity to entertain the deliberate purpose or peculiar intent necessary to constitute the offense of disobedience of orders *overruled*. (C. M. O. 208, 1919, 6.)
3. **Voluntary drunkenness**—No defense to charge of, C. M. O. 77, 1906, affirmed. (C. M. O. 208, 1919, 6.)
4. **What constitutes.** (C. M. O. 6, 1921, 11.)
5. **Definition**—What constitutes disobedience of lawful order of superior officer. (C. M. O. 57, 1917, 2.)
6. (*a*) **Drunkenness as a defense to**; (*b*) **incompetency or impossibility of execution as a defense to**—An accused in a recent case was charged with "Disobeying the lawful order of his superior officer" and the specification thereunder alleged that he "did willfully disobey the lawful order," etc. The accused plead guilty to the charge and specification, and then submitted a statement to the effect that (*a*) he was under the influence of intoxicating liquor and unfit for duty, and (*b*) the order was a very severe one and one which he was incapable of carrying out. Such a statement may well be held to be inconsistent with the plea of guilty because (*a*) above, tended to show that the accused was incapable of harboring the intent necessary to constitute the offense of willful disobedience of orders (*see* Naval Digest, 1916, p. 196, sec. 51; *see also* file 26262–4234, G. C. M. Rec. No. 37786), and (*b*) tended to show that the accused was incompetent to carry out the orders, or that it was impossible for him to do so, either of which, if established by evidence, would have been a good defense to the charge. It therefore became the duty of the court to instruct the accused as to the nature and effect of his statement, in order that he might have withdrawn his plea of "guilty" and substituted the plea of "not guilty," or if he persisted in his plea, to direct that the plea of "not guilty" be entered and then proceed with the trial as if the latter plea had been made. (Naval Dig., 1916, p. 585, sec. 18.) As such a course was not pursued, the department disapproved the findings on the charge. (File 26262–4237, J. A. G., G. C. M. Rec. No. 37789; C. M. O. 50, 1918, 18.)
7. **Drunkenness as a defense**—Drunkenness to such an extent as to render one incapable of obeying an order or which might cause him to forget that order after he had started to execute it, would be a defense. (C. M. O. 208, 1919, 7.)
8. **Drunkenness as a defense**—Cases where even the general intent required by law are lacking. (C. M. O. 208, 1919, 7.)
9. **Foreign language—Orders given in**—One could not be guilty of willfully disobeying orders given in a foreign language, which he did not understand. (C. M. O. 208, 1919.)
10. **Interpretation.** *See* COMMAND.
11. **Order should be understood.** (C. M. O. 208, 1919, 7.)

DISRATING.

Table of classification for. (C. M. O. 11, 1921, 12–18.)

DOCUMENTARY EVIDENCE.

1. *See* EVIDENCE.
2. **Admissibility of.** (C. M. O. 12, 1921. 8.)
3. **Official correspondence.** (C. M. O. 2, 1921, 20.)

DONATION AS GIFT.

Prohibition against—Does not apply to enlisted men. (C. M. O. 293, 1919, 3.)

"DOUBLE JEOPARDY." *See* JEOPARDY, FORMER.

DOUBLE TIME FOR FOREIGN SERVICE. *See* RETIREMENT.

DRINKING INTOXICANTS IN PUBLIC PLACES.

Charges upon which men guilty of, should be tried—It was held, there could be no doubt of the propriety or legality of bringing to trial on a charge of "Conduct to the prejudice of good order and discipline" or "Scandalous conduct tending to the destruction of good morals" a member of the naval service who disgraces himself and the service by openly and brazenly partaking of intoxicating liquor on the street of a city or in any other public place. (File 26262–4362, G. C. M. Rec. No. 38228, C. M. O. 71, 1918.)

DRUNKEN FRENZY.

Accused—Convicted of, "Drunkenness" and "Willful injury to Government property" notwithstanding it was shown that he injured the property in question while in a drunken frenzy. (C. M. O. 208, 1919, 8.)

DRUNKENNESS.

1. **As a defense.** *See* DISOBEDIENCE OF ORDERS.
2. **"Asked a sailor to escort him through the yard."** (C. M. O. 36, 1916, 2.)
3. **Degree of intoxication**—A judge advocate invited the attention of the court to C. M. O. 5, 1915, in which it is stated that "the degree of intoxication goes to the gravity of the offense but does not relieve an officer of the consequences of his condition if he has been guilty of such overindulgence as will incapacitate him for the full performance of his duties." In the Army Digest, 1912 (540 XII A 9a), drunkenness within the meaning of the articles of war is defined as "any intoxication which is sufficient sensibly to impair the rational and full exercise of the mental and physical faculties." Nor do the Articles for the Government of the Navy require any particular degree of drunkenness, and it is considered that such charge is supported by showing incapacity for the full performance of duty as a result of indulgence in intoxicating liquor. (C. M. O. 17, 1917, 4.)
4. **Duration**—When one has become intoxicated, his continuance in this state until sufficient time has elapsed to permit of his becoming sobered, is to be presumed and such continuance forms a necessary part of each single offense of drunkenness and should not be separately alleged. (C. M. O. 17, 1916, 9.)
5. **Officers treating enlisted men.** *See* OFFICERS.

DRUNKENNESS ON DUTY.

Dismissal—Is mandatory in the Army and should be in the Navy. (C. M. O. 67, 1902, 2.)

DUPLICATION OF CHARGES. *See* CHARGES AND SPECIFICATIONS.

EJUSDEM GENERIS.

Rule of—While unqualified general terms are usually to be given their natural and full signification, yet when general words follow in a statute words of particular and special meaning, if there be not a clear manifestation of different legislative intent, they are construed as applicable to persons and things, or cases of like kind, as are designated by the particular words. (C. M. O. 190, 1918, 23.)

ELECTION ON BOARD SHIP.

Holding of. (C. M. O. 230, 1919, 14.)

ELIGIBILITY OF TEMPORARY LIEUTENANT OF THE LINE TO RECEIVE A COMMISSION AS A LIEUTENANT IN THE SUPPLY CORPS UNDER THE PROVISIONS OF SECTION 4 OF THE ACT OF JUNE 4, 1921. (C. M. O. 4, 1921, 13).

EMBEZZLEMENT. *See* CHARGES AND SPECIFICATIONS; LARCENY.

EMOLUMENTS. Can not be legally surrendered. *See* MILEAGE.

EMPLOYMENT.

1. **For compensation while on furlough**—An enlisted man sent home on furlough, with pay, to await call is in the active service of the United States within the meaning of section 35 of the act of June 3, 1916 (national defense act), and is therefore prohibited from engaging "in any pursuit, business, or performance in civil life for emolument, hire, or otherwise" in competition with local civilians. (File 7657–449, J. A. G., June 19, 1917; C. M. O. 37, 1917, 12.)
2. **Retired officer as Government contractor.** *See* RETIRED OFFICERS.

ENGINEERING DUTIES ONLY.

Status of acting ensign—For exhaustive discussion, *see* File 28087–24:1, J. A. G., 5 Mar., 1918. (C. M. O. 30, 1918, 24.)

ENGINEER OFFICERS.

1. **Additional numbers in grade**—Officers assigned to engineering duty only under the act of August 29, 1916, do not, upon promotion to a grade below that of commander, become additional numbers in grade. (File 28687-24, J. A. G., Nov. 16, 1917; C. M. O. 72, 1917, 18.)
2. **Exercising military command.** *See* COMMAND.
3. **Succession to command.** *See* COMMAND.

ENGINEERING DUTIES.

Officers designated for—Additional number when promoted to higher grade. (C. M. O. 296, 1919, 11.) *See* ADDITIONAL NUMBER.

ENLISTED MEN OF THE NAVY.

Civil rights of. (C. M. O. 280, 1919, 12.) *See* CIVIL RIGHTS.

ENLISTED MEN.

1. **Competing with civilians.** *See also* EMPLOYMENT.
2. **Deposits.** *See* DEPOSITS.
3. **Engaging in civil pursuits**—"Hereafter no enlisted man in the active service of the United States in the Army, Navy, and Marine Corps, respectively, whether a non-commissioned officer, musician, or private, shall be detailed, ordered, or permitted to leave his post to engage in any pursuit, business, or performance in civil life, for remuneration, hire, or otherwise, when the same shall interfere with the customary employment and regular engagement of local civilians in the respective arts, trades, or professions." (39 Stat. 188.)

   Held, That the furnishing of transportation to a Navy band for the purpose of playing at a charity ball could not be considered as remuneration and was therefore not in violation of the above-quoted act, and that the law does not prohibit the men in question from engaging in civil pursuits *without remuneration* notwithstanding that the same may interfere with the customary employment and regular engagement of local civilians. (File 4924-435, J. A. G.) (File 4850-219, J. A. G.; C. M. O. 3, 1917, 6.)
4. **Expiration of enlistment while holding temporary appointments.** *See* APPOINTMENT, TEMPORARY.
5. **On detached duty: Status as to punishment**—An enlisted man attached to a receiving ship was assigned to "Detached duty" at the marine barracks at the navy yard where said receiving ship was. His pay accounts and service record were carried by the receiving ship.

   He was punished for an offense by the commanding officer of the marine barracks. The contention was raised that the commanding officer of the marine barracks had acted without the jurisdiction of his office in inflicting said punishment, and that the case should have been referred to the commanding officer of the receiving ship for disciplinary action.

   The Judge Advocate General concurred in the views of the Major General Commandant of the Marine Corps, to the effect that the man in question, being detached from the receiving ship for duty at the marine barracks, was part of the command of the commanding officer of said marine barracks, and that the case came within article 4182, Navy Regulations, 1913. (File 7657-552, J. A. G., 12 Feb., 1918; C. M. O. 15, 1918, 16.)
6. **Temporary appointment**—Status of enlisted men holding temporary appointments, whose enlistments expire during continuance of temporary appointments. (C. M. O. 37, 1917, 14.)

ENLISTMENT.

1. **Convicts should not be enlisted**—It is a long established policy of the Navy Department not to enlist men who have been convicted by civil courts. For similar reasons the department invariably refuses to retain in the naval service enlisted men who are convicted by civil courts of offenses which render them unfit for the service. (C. M. O. 42, 1915, 6; 35, 1915, 9; File 26524-222:3, Sec. Navy, Feb. 9, 1916; C. M. O. 5, 1916, 7.)
2. **Effect of expiration**—An accused whose enlistment expires during the time that he is being held for trial by court-martial but who has not been given a discharge is subject to the jurisdiction of a naval court-martial upon the charges for which he is being held. But he is no longer in the Navy. (C. M. O. 39, 1919, 17.)

3. **Effective moment of extension**—A written agreement of extension of enlistment made by a marine who is held in service under section 1422, Revised Statutes, after his enlistment has expired, because such action is essential to the public interests, such agreement having been executed prior to the time he is so held in service, and of consequent discharge, but subsequent to the expiration of the four-year term of enlistment, is valid and becomes effective from the expiration of the period during which he is so held in service, and not from the expiration of the four-year term. (File 7657–505, J. A. G., 29 Oct., 1917; C. M. O. 67, 1917, 16.)
4. **Expiration of**—An enlisted man may be held for trial by court-martial after his enlistment expires, provided the necessary steps are promptly taken with a view to such trial. (C. M. O. 39, 1919, 19.)
5. **Expiring during the continuance of temporary appointments.** *See* APPOINTMENTS, TEMPORARY.
6. **Extension**—An enlistment extended prior to September 1, 1919, may be changed to a duration-of-the-war enlistment if application is made on or before that date, and it may then be extended further. (File 26254–2881:121, Sec. Navy, 4 Sept., 1920; C. M. O. 119, 1920, 16.)
7. **Extension**—Members of the Naval Reserve Force, in order to extend their enrollments under the act of 11 July, 1919, must first transfer to the Regular Navy for the unexpired portion of their enrollments; they must then have their enlistments changed to that of a duration-of-the-war enlistment, and application therefor must be made before September 1, 1919, and when their status is thus changed they may then have their enlistments extended. Having transferred to the Regular Navy for the unexpired portion of their enrollments, they may under the act of August 22, 1912, have their enlistments extended without having them changed to duration-of-the-war enlistments. (File 26254–2881:76, Sec. Navy, 13 Feb., 1920; C. M. O. 48, 1920, 33.)
8. **Extension**—To enable men to extend their enlistments under the provisions of the act of 11 July, 1919, they must have enlisted for the period of the war, or they must have had their status changed to that of men who enlisted for the period of the war. (File 26254–2881:76, Sec. Navy, 13 Feb., 1920; C. M. O. 48, 1920, 33.)
9. **Marine**—There is no provision of law prohibiting the original enlistment of marines abroad, this inhibition having its origin and existence in the Navy Regulations only. (File 3980–1353, J. A. G., June 8, 1917; C. M. O. 37, 1917, 12.)
10. **Minority**—An enlisted man serving in a minority enlistment may legally be discharged within three months of the date of the expiration of his enlistment, under the provisions of the act of 22 August, 1912 (37 Stat. 331), and if so discharged he is entitled, upon reenlistment within four months, to additional pay for continuous service and for the purposes set forth in section 4427 (25), Navy Regulations, 1913. (File 7657–1075, Sec. Navy, 13 Aug., 1920; C. M. O. 115, 1920, 16.)
11. **Minority enlistments may be extended**—Any enlistment for minority in the Navy or Marine Corps may be extended as is provided by law for extending an enlistment for a term of four years, under similar conditions with like rights, privileges, benefits, and obligations under the provisions of the act of April 25, 1917. (C. M. O. 32, 1917, 6.)
12. **Moment of completion**—One is an enlisted man in the Navy from the date he is examined and passed and entered upon the duty. (File 7657–465, J. A. G., 1 Aug., 1917; C. M. O. 53, 1917, 13.)
13. **Requisite to complete the contract**—A man who signs the shipping articles; accepts and is furnished transportation; is passed by a medical officer; is furnished and accepts clothing, subsistence; and is actually assigned to duty; becomes legally, and is for all purposes, an enlisted man of the Navy in spite of his refusal to take the oath of allegiance. (File 15037–58, J. A. G., Apr. 6, 1917; C. M. O. 32, 1917, 6.)
14. **Offenses committed after.** (C. M. O. 186, 1919, 45.) *See* COURT-MARTIAL.
15. **Retention of men after, to investigate charges against.** (C. M. O. 39, 1919, 19.) *See* COURTS-MARTIAL.

ENLISTMENT FOR DURATION OF WAR. Extension of. (C. M. O. 7, 1921, 16.)

ENSIGN. Prohibition as to appointment of men over 50 years of age. *See* WARRANT OFFICER.

ERASURE. *See* PROCEDURE.

ERROR.

1. **Court**—Not taking an adjournment before close of trial in order that defense might procure attendance of witnesses requested to testify to a certain charge and the specifications thereunder, resulted in disapproval of the findings on said charge and the specifications thereunder. (C. M. O. 144, 1919.)
2. **Court**—Refused to admit testimony of two officers taken before a board of investigation and a court of inquiry respectively. One of said officers deceased, the other on the inactive list and outside jurisdiction of court. Such testimony constituted entire defense of accused. (C. M. O. 157, 1919, 2.)
3. **Judge advocate**—Stated in closing argument that he had witnesses not called who would clear up any doubt existing in the minds of the court, but to avoid delaying the proceedings he had not called them. *Held*, this procedure can not but be considered as an effort to influence the decision of the court by means other than by proper introduction of relevant and material evidence. (C. M. O. 147, 1919.)
4. **Judge advocate**—Suggests that if the court felt that accused had been deprived of his rights, and that his guilt had not been established beyond a reasonable doubt, he would call additional witnesses should the court so decide. *Held*, this was in fact a request that the court come to a finding as to the guilt or innocence of the accused in a manner not provided by law. (C. M. O. 147, 1919.)
5. **Not invalidating**—Failure to arraign and find under correct rating does not invalidate proceedings, findings, and sentence. (C. M. O. 39, 1919, 18.) *See* ACCUSED.
6. **Not invalidating**—Failure to comply with the provisions of section 253 (*a*), Naval Courts and Boards, 1917. (C. M. O. 239, 1919.)
7. **Same**—Presence of a member of the court at an investigation of the offense for which the accused was tried. "Neither the presence of a member of the court at such investigation, his participation therein, nor his being called as a witness for the prosecution, invalidates the proceedings." (*See* Naval Digest, 1916, p. 379, secs. 54–56; C. M. O. 136; 138, 1919.)
8. **Prejudicial**—To admit in evidence testimony of accused before a board of investigation which amounted to a confession when no proof adduced to show such confession was voluntarily made. (C. M. O. 147, 1919.)
9. **Procedure**—Letter transmitting charge and specifications dated prior to precept convening court. While irregular, not sufficiently so to invalidate. (G. C. M. Rec. No. 39225; C. M. O. 184, 1919, 2.)
10. **Procedure**—Omissions in record which were not. (C. M. O. 2, 1919.)

ESCAPE.

1. **Civil prisoners**—A prisoner lawfully confined by military government may be held by the use of such measures as may be reasonable and necessary. The imposition of a punishment, as a result of trial for escaping or attempting to escape, is a measure recognized by the United States Army (Manual of Interior Guard Duty, U.S. Army, 1914, par. 279) and also by the Navy. It is a matter within the sound discretion of the proper officers of the military government whether that government will punish prisoners properly within its custody through the intervention of a judicial tribunal for attempting to escape or whether it will punish them by more summary proceedings for such offense, or whether it will award no punishment whatever, but instead will depend on the deterrent effect of the risk of injury while in flight, all or any of these methods being resorted to only in connection with jurisdiction acquired by lawful custody and to the end of preserving custody through the effect of example or as an adjunct to the enforcement of internal discipline. The head of the military government may establish provost courts and confer jurisdiction as he deems proper. (File 16870–47: 90, J. A. G., 3 Oct., 1917; C. M. O. 67, 1917, 16.)
2. **From confinement.** *See* "HIS OWN WRONG."

EVIDENCE.

1. *See* EVIDENCE, DOCUMENTARY; JUDGE ADVOCATE.
2. **A confession may not be used to establish the corpus delecti.** (C. M. O. 2, 1921, 18.)
3. **A witness whose competency is questioned can not introduce evidence with a view to establishing his competency.** (File 26276–163, J. A. G., Apr. 9, 1917; C. M. O. 32, 1917, 7.)
4. **Accused having plead guilty, evidence denying guilt is inadmissible**—The court after accepting the plea of guilty to the specification of the charge "Drunk and unfit for duty" permitted evidence to be introduced tending to show that he was not in the condition as stated in the specification. The court was in error in admitting

this evidence as the accused by his plea deprived himself of the benefit of a regular defense and could call witnesses and introduce evidence only as to previous good character or in extenuation of his conduct. (*See* Naval Digest, 1916, p. 222, par. 60; C. M. O. 66, 1917.)

5. **Admissions.** *See* ADMISSIONS.
6. **Best evidence rule—Relates to writing only**—Where counsel for accused moved to strike out the testimony of certain witnesses concerning stains which they claimed to have seen on certain garments worn by accused, on the ground that the garments were the best evidence and were in existence. *Held:* The best evidence rule, as now understood, relates to writings only (McKelvey, 425, 426). Further, that whenever evidence of the condition of clothes or other articles of personal property is competent and material, the same may be described by witnesses without producing the articles themselves. (Comm. *v.* Pope, 103 Mass. 440; Underwood *v.* Comm., 84 S. W. (Ky.), 310; State *v.* McAfee, 50 S. W. (Mo.), 82; File 26262-6441, J. A. G., 4 June, 1919; C. M. O. 209, 1919, 16.)
7. **Bias**—A court ruled to exclude evidence tending to show bias or prejudice of the witness against the accused, on the ground that prejudice of the witness had nothing to do with the charges and specifications. *Held,* it is well settled that such evidence is admissible and the court in its ruling committed a grave error. If the prosecution had been dependent for a conviction upon the testimony of this witness, the error would have been fatal. (C. M. O. 82, 1917, 2.)
8. **Character**—Documents as to previous good character introduced by defense in evidence; person having custody of the documents should take the stand as witness to identify such documents. (*See* sec. 187, Naval Courts and Boards, 1917; C. M. O. 222, 1919.)
9. **Copy of letter of reprimand**—Being a copy of an official public record and as such, when properly authenticated, is admissible under the same conditions which would render admissible the original. (C. M. O. 59, 1919.)
10. **Copy of statement of a witness improperly introduced into.** (C. M. O. 237, 1919, 13.)
11. **Cumulative**—Irregular ruling of court on the question of what constitutes. (C. M. O. 224, 1919, 2.)
12. **Documentary**—Certificate of resident physician of general hospital; court incorrectly admitted in. The paper in question was ex parte, was not the best evidence, and the witness was not dead or insane. (C. M. O. 196, 1919.)
13. **Documentary**—Copy of a letter of reprimand introduced in. (C. M. O. 59, 1919.)
14. **Entire record of courts of inquiry are not admissible**—The entire record of a court of inquiry was introduced in evidence over the objection of the accused, whereas only important and specific matter was all that was admissible. Inasmuch as it was impossible to ascertain how much of the record had actually been considered by the court and as to whether or not the interests of the accused were actually prejudiced thereby, the department disapproved the proceedings. (C. M. O. 24, 1917, 1.)
15. **Function of the court and witnesses**—The testimony of witnesses should be confined to the facts in the case, and it is the exclusive function of the court to draw the inferences which may be predicated upon the facts established by the testimony. (Index Digest, 1914, p. 20; C. M. O. 49, 1915, 15; C. M. O. 17, 1916, 9.)
16. **Hearsay.** *See* HEARSAY EVIDENCE.
17. **Hearsay**—C. M. O. 8 (10), C. M. O. 9 (10), C. M. O. 7 (12), 1919.)
18. **Hearsay**—Not sufficiently prejudicial to constitute fatal error. (C. M. O. 248, 1919.)
19. **Hearsay**—Objected to, erroneously admitted. (C. M. O. 230, 1919, 2.)
20. **Hearsay**—Receipt of letter improperly excluded as. (C. M. O. 295, 1919.)
21. **Improperly admitted**—Testimony of accused before a board of investigation which amounted to a confession admitted in evidence without proof to show confession was voluntarily made. (C. M. O. 147, 1919.)
22. **Inconclusive**—An accused was charged with "Neglect of duty," the specification thereunder alleging that he did suffer a prisoner to secure and indulge in intoxicating liquor.

"The word 'suffer' is defined as 'to allow,' 'to admit,' or 'permit.' It implies a *knowledge* of the thing suffered or done; and a conviction for suffering a thing to be done can not be sustained without proof of knowledge (see Gregory *v.* U. S., Fed. Case No. 5803). The prosecution established the fact that the accused was on duty in charge of one of the prisoners, and that while on such duty both he and the prisoner were under the influence of intoxicating liquor. However, it is only to be implied

from the evidence of the prosecution that the accused 'suffered' the prisoner to obtain and indulge in his liquor. Against the prosecution's case the defense introduced evidence to show that the prisoner had an opportunity to procure liquor unknown to the accused, his guard, and the prisoner testified as to how he had obtained the liquor and that it was done without the knowledge of the accused. Furthermore, the accused went on the stand in his own behalf and denied that he was aware of how the prisoner procured the intoxicating liquor."

Department being of the opinion that the specification of the above charge was not proved beyond a reasonable doubt, disapproved the findings on said charge and the specification thereunder. (File 26262-6453, J. A. G., 28 May, 1919; C. M. O. 186, 1919, 24.)

23. **Incriminating questions**—Witness having been ordered to answer an alleged incriminating question the only immunity arising therefrom is that such incident shall not be used against him in a future criminal proceedings. (C. M. O. 212, 1919, 5.)
24. **Indefinite**—"Testimony of a witness, offered to prove the handwriting of a person, that he can not swear decisively that it is his, or testimony that it has a close resemblance to his, or that he sees nothing differing from the character of his writing, is not admissible as implying the opinion or belief of the witness that it is genuine." (31 New Hampshire, 251; 20 American Digest, 3253; File 26251-2275, J. A. G., Mar. 8, 1920; G. C. M. Rec. No. 46784; C. M. O. 60, 1920, 15.)
25. **Inadmissible**—If admitted without objection, its inadmissibility must be deemed to have been waived. (File 26251-25761, 11 Nov., 1920; G. C. M. Rec. 50273; C. M. O. 133, 1920, 12.)
26. **Involuntary testimony of the accused will not support the charge.** *See* PERJURY.
27. **Intoxication**—Testimony of pharmacist's mate to the effect that his written report as to condition of accused was based, not on his examination of accused, but on accused's statement that "they had been drinking," which statement the accused testified referred to others and not to himself. (C. M. O. 191, 1919.)
28. **Irregularities in admission of.** (C. M. O. 11, 1921, 9.)
29. **Irregular procedure**—Introducing documentary evidence; where interests of the accused are not prejudiced thereby, but rather the contrary, the irregular procedure not considered as of an invalidating character. (C. M. O. 222, 1919.)
30. **Refreshing memory**—Improper use of memoranda to refresh memory of the witness. It was not shown that the memoranda were made at the time of the occurrence of the incident in question or soon thereafter. (G. C. M. Rec. No. 50739; C. M. O. 144, 1920.)
31. **Memory contrasted with documents**—A witness testified to the existence of certain shortages in a very general way; that his audit had developed certain irregularities; stating the amount to the best of his recollection, and that the total amount of clothing charges on the pay roll for the various quarters differed from the total amount as shown by the clothing receipts; but in no manner was he specific. Counsel objected and asked that his answers be stricken from the records on the ground that the witness had been permitted to state facts from his memory when it can be shown that the best evidence is the pay roll. Another witness stated that a different manner of checking the pay roll produced different results; also, that investigations covering other periods were made, by hurried comparison. When the results of same were requested, counsel objected on the ground that, the witness having stated that his examination was hurried and from his own testimony was not accurate nor absolute, therefore, the papers, accounts, and books, being the best evidence, should be produced against the accused. The objections made by counsel were valid. The witnesses were permitted to express conclusions they had reached as the result of certain examinations and investigations made, substituting their judgment for that of the court, which alone was competent to reach conclusions after proper evidence had been presented. The pay rolls in this case would have been the best evidence. One of the three principle rules governing the admission of testimony is that "the best evidence must be produced of which the case is susceptible"; that is, where the evidence actually offered indicated of itself the existence of higher evidence, for which it is clearly only a substitute, the substitutional evidence is incompetent and not to be admitted if objected to. (Winthrop's Military Law and Precedents, pp. 482-486; Wigmore on Evidence, vol. 2, sec. 1230; C. M. O. 78, 1917, 2.)
32. **Newly discovered**—Assigned as basis for new trial. (C. M. O. 275, 1919.) *See* NEW TRIAL.

33. **Not sufficient to sustain finding of guilty**—After eliminating an involuntary confession of accused. (C. M. O. 147, 1919, 2.)
34. **Objections**—To admissibility of evidence should be briefly set forth in record, but not arguments thereon. (C. M. O. 87, 1917, 3.)
35. **Of an accomplice**—Weight of. (C. M. O. 237, 1919, 12.) *See* ACCOMPLICE.
36. **Of a fact admitted in open court.** *See* PROOF.
37. **Of conviction of crime**—Admissible. (C. M. O. 317, 1919, 3.)
38. **Of former indictment**—Inadmissible. It should be remembered by naval courts-martial that although evidence that a witness has been convicted of a crime is admissible for the purpose of impeaching him, evidence of a mere accusation or indictment is not admissible for that purpose. (Glover *v.* U. S., 147 Fed. Rep. 426.) This rule applies to both criminal and civil actions and to all witnesses whether parties or not. (People *v.* Morrison et al., 195 N. Y. 116.) The reason for this rule ought to be apparent even to the lay mind. Proceedings before a grand jury are ex parte, and the accused has neither the right nor the opportunity to be present and defend. He has not had his day in court, and the indictment against him is at most a mere accusation on which there has been no judgment. The witness * * * in a vain attempt to defend himself from the unreasonable and unwarranted attack of counsel for the defense very correctly stated: "Some of the best persons in the world have been indicted and never brought to trial, and the indictments have been dropped." (Record, p. 1296.) In the instant case the witness testified under oath that the indictments against him had been dropped, or "nol prossed."

    As for the copy of the record of the court of Indiana relating to the civil proceedings, in which the witness was a party some 19 years ago, surely no comment is necessary except to say that its introduction in the case was highly improper. There was no question before the court concerning the matter at issue in said proceedings, and certainly there was nothing in the bare record of the case which would shed any light upon the character of the parties thereto or their credibility as witnesses. (C M. O. 317, 1919, 3.)
39. **Only matters in proof of allegations set forth in the specifications may be introduced in evidence.** (C. M. O. 2, 1921.)
40. **Opinion of a witness**—Not an expert, that two writings were executed by the same man and that two fingerprint records were those of the same person, is inadmissible. (C. M. O. 60, 1920, 14.)
41. **Opinions of witnesses, admissibility of.** (C. M. O. 12, 1921, 8.)
42. **Proceedings of a court of inquiry**—Are admissible when offered in evidence by the accused in his own behalf, the right of the accused to be confronted by the witnesses against him being one which he may waive. (Mullan *v.* U. S., 212 U. S. 516; C. M. O. 157, 1919, 2.)
43. **Refreshing memory**—A court overruled the objection of the judge advocate in allowing a witness to refresh his memory from a report not made by himself. In this there was an error. The use of memoranda to refresh the memory of a witness is confined to the case where the memorandum was made by the witness himself at a time when the facts were fresh in his mind (Naval Courts and Boards 1917, sec. 145.) (G. C. M. Rec. No. 47668; C. M. O. 87, 1920, 2.)
44. **Statement under seal and extract from a medical journal of naval hospital erroneously admitted over objection of accused**—Ex parte statements of this sort are incompetent, irregular, and objectionable as hearsay, since real witness was not testifying in court under sanction of an oath, and opposite party had no opportunity to be confronted with a witness against him, or to exercise his right to cross-examination. (C. M. O. 230, 1919, 2.)
45. **Statements by third parties in presence of accused**—"Silence of a party in presence of a statement made by another may be put in evidence against him on the ground that from his silence his assent to what is said is inferred. To give such silence, however, effect as an admission, the party charged with it must have been in a position to explain. Before acquiescence in the language or conduct of others can be assumed as a concession of the truth of any particular statement, or the existence of any particular fact, it must plainly appear that the language was heard and the conduct understood. (Wharton's Criminal Evidence (9th ed.), sec. 680.) In commenting on this principle, Mr. Wharton cites the cases of Commonwealth *v.* Brailey, 134 Mass. 530, in which Judge Morton, chief justice, says:

    "Declarations made in the presence of a party, to which he makes no reply, are sometimes competent, as equivalent to tacit admission by him. This depends on

whether he knew and understood them; whether he is at liberty to reply, whether he is in custody or under any restraint or duress, and whether the statements are made by such persons and under such circumstances as naturally call for a reply." (Hauger *v.* U.S., 173 Fed. 55, 59.) (File 26276-393, J. A. G., 23 Apr., 1920; C. M. O. 74, 1920, 15.)

46. **Statements by third party in presence of accused**—"Where a witness testifies 'the police officer stated that the accused gave himself up,' and it is proved that such statement was made in the presence of the accused, it is admissible in evidence, not being hearsay. C. M. O. 214, 1902." (Naval Digest, 1916, p. 180, sec. 125.)

That citation is a correct statement of the law of evidence as applied to the case reported in C. M. O. 214, 1902. It should be noted, however, that the statement was offered by the *prosecution*, and objected to by the court. As stated by Rice on Evidence, volume 3, pages 500–501:

"What a third person says in the presence of a person charged, is admissible *against* him if he remains silent. His silence must be taken as an acquiescence in its truth."

This statement in Rice is supported by the citation of a great many authorities and is generally accepted by the courts and textbook writers as the correct rule of evidence.

It does not follow that because such statements can be admitted *against* the accused they can be admitted in his *favor*.

"Testimony of declarations made by a third person is not admissible in behalf of a defendant charged with crime, though made in his presence." (Amer. Dig., Century Ed., vol. 14, p. 1631, citing People *v.* Foo, 112 Cal. 17; 44 Pac. 453.)

Declarations made by third persons in the presence of the accused and acquiesced in by him either by express assent or by remaining silent are admitted as exceptions to the hearsay rule on the same grounds that admissions and confessions are received in evidence. (Rice on Evidence, vol. 3, p. 500, etc.) (File 26276-393; C. M. O. 74, 1920, 15.)

47. **Sworn testimony before a board of investigation and a court of inquiry admissible before court-martial**—In a recent court-martial case the defense offered in evidence the sworn testimony of two officers taken before a board of investigation and a court of inquiry, respectively. The testimony of these witnesses was material, they being the only eyewitnesses to occurrences which formed the basis of a charge against accused, other than the prosecuting witness. At the time of the trial one of these witnesses was dead, and the other on the inactive list and outside the jurisdiction of the court. The court refused to admit this testimony on the ground that to do so would restrict the punishment that might be adjudged on a finding of guilty. The department was of opinion that the court erred in the above ruling. The testimony before the court of inquiry was admissible independently of article 60, Articles for the Government of the Navy (Naval Courts and Boards, sec. 198 (*e*)), which states that proceedings of a court of inquiry are admissible when offered in evidence by the accused in his own behalf, the right of the accused to be confronted by his witnesses being one in which he may waive (Mullan *v.* United States, 212, U. S. 516). Having thus waived the restrictions of article 60, Articles for the Government of the Navy, the limitations to punishment set out in that article do not apply.

The testimony under oath before the board of investigation was clearly admissible (art. 60, A. G. N., having no application to the proceedings of boards of investigation) under the general rules of evidence. (Naval Courts and Boards, 1917, 1918 (*a*); Mullan *v.* U. S., 212 U. S. 516; C. M. O. 153, 1919, 30.)

48. **Weight of evidence or credibility of witnesses**—The department will not, in a doubtful case, attempt to decide as to the weight of the evidence or credibility of the witnesses and thereby usurp the functions of the court. The court hears the witnesses, observes their demeanor on the stand, and draws its own conclusions as to the weight to be given to the testimony and the credibility of the witnesses. C. M. O. 48, 1920, 28.)

49. **Where prosecution and defense offers no**—Record should show affirmatively. (C. M. O. 126, 1919.)

EVIDENCE, DOCUMENTARY.

1. **Admissibility of records and courts of inquiry independently of article 60, A. G. N.**—Article 60, A. G. N., was not intended to restrict the admissibility of courts of inquiry records in evidence where such records might have been admitted under general principles of the law of evidence; it was intended to enlarge the rules of evidence by authorizing the records of courts of inquiry to be admitted in certain cases where they would otherwise have been inadmissible. (C. M. O. 51, 1914, 6.) Therefore where the proceedings of courts of inquiry are used in evidence independently of article 60, A. G. N., the limitations contained in said articles as to "cases not capital nor extending to the dismissal of a commissioned or warrant officer," and the limitations contained in section 390, Naval Courts and Boards, 1917, as to loss of numbers, do not apply. (C. M. O. 46, 1917, 14.)
2. **Appeal based on use of.** *See* APPEAL.
3. **Boards of investigation.**—If the accused was afforded opportunity to cross-examine the witnesses before the board of investigation, either in person or by counsel, their testimony may be received against him in a subsequent court-martial or court of inquiry, in cases where the witnesses have since died (Mattox *v.* U. S., 156 U. S. 237; U. S. *v.* Macomb, 26 Fed. Cas., No. 16702; U. S. *v.* White, 28 Fed. Cas. No. 16679; U. S. *v.* Wood, 28 Fed. Cas. No. 16756), or where the witnesses are absent by the procurement of the accused, "or when enough had been proved to cast upon him the burden of showing, and he having full opportunity therefor, fails to show, that he has not been instrumental in concealing them or in keeping them away." (Reynolds *v.* U. S., 98 U. S. 145); but such testimony can not be so received in evidence where the witnesses are absent otherwise than through the connivance or by the procurement of the accused even though they are beyond the jurisdiction of the court. (U. S. *v.* Angel, 11 Fed. Rep. 34; Motes *v.* U. S. 178 U. S. 458; State *v.* Wing (Ohio), 64 N. E. 514, followed; State *v.* Huffman (Ohio), 99 N. E. 295; C. M. O. 46, 1917, 18.)
4. **Boards of investigation, records**—Regular and irregular manner of introducing records of boards of investigation into evidence. (C. M. O. 17, 1920, 1; 144, 1920.)
5. **Letters of third parties**—In a case of "guilty by plea" the record having been returned to the court for reconsideration of sentence, which convening authority deemed inadequate, letters of third parties are, when quoted by the convening authority in his order reconvening the court, admissible to be considered by the court in adjudging sentence. (But see Dehart's Military Law, p. 204; Bishop's Criminal Procedure, par. 1325; C. M. O. 31, 1920, 7.)
6. **Interpretation of article 60 of the Articles for the Government of the Navy**—"In all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, * * * the foregoing has been construed to mean that the proceedings of courts of inquiry shall not be admissible in evidence before a court-martial under authority of article 60, A. G. N., where the sentence of death or dismissal is by law made *mandatory* upon conviction of the offense charged (C. M. O. 88-1895, pp. 13, 14; G. C. M. Rec. No. 11279). The sentence of death is not under the article for the Government of the Navy, mandatory upon conviction in any case, triable by a naval court-martial (see art. 7, A. G. N.). Where a court-martial is authorized but not required to adjudge the punishment of death or dismissal upon the conviction of an offense, the proceedings of a court of inquiry may, under the terms of article 60 of the Articles for the Government of the Navy, be introduced in evidence against the accused, subject to the remaining conditions prescribed in said articles, but in any case which the proceedings of a court of inquiry are so used in evidence under article 60 of the Articles for the Government of the Navy, the court must be careful not to adjudge a sentence extending to death or dismissal. In time of peace the punishment which may be imposed upon conviction in such cases in which the proceedings of a court of inquiry are used in evidence against an officer on trial by court-martial is limited by section 390, Naval Courts and Boards, 1917, to the loss of one hundred numbers in rank. This limitation does not apply in time of war, and court-martial may under such circumstances adjudge any appropriate sentence authorized by the Articles for the Government of the Navy, provided it does not extend to death or dismissal. (C. M. O. 46, 1917, 13.)
7. **Manner of making records of courts of inquiry, etc., part of the record of court-martial**—The testimony as read by the judge advocate should be recorded in the body of the court-martial record, together with the objections and rulings of the court thereupon, in the same manner as though such testimony were given before the court-martial in person by the witness who appeared before the court of inquiry. The accused should be allowed on cross-examination of the judge advocate to require that he read any other testimony given by the same witness before the court of inquiry which

might serve to explain or to affect the weight of his testimony as read on direct examination, and to proceed further in the case in the direction of contradicting the witness, impeaching his reputation for truth and veracity, etc., in the same manner as though the witness had given his testimony in person at the trial. In the event that the proceedings of the court of inquiry are offered in evidence by the accused, the procedure should be the same as in the case above, except that the judge advocate, as custodian of the records, would be called as a witness for the defense for the purpose of giving such proceedings before the courr. The fact that the testimony of a witness before a court of inquiry may be legally admissible in evidence before a court-martial does not render the entire proceedings of the court of inquiry competent as evidence (C. M. O. 24, 1917), and this of course applies with especial force to findings of the court of inquiry. (Naval Digest, 1916, p. 131, sec. 18; C. M. O. 46, 1917, 17.)

8. **Methods of introducing court of inquiry proceedings**—Where it is decided by the court to receive the proceedings of a court of inquiry in evidence against the accused, the procedure to be followed should be substantially the same as that outlined in Naval Courts and Boards, 1917, section 182, with reference to depositions, i. e., a proper foundation having been laid for the introduction of the proceedings, by establishing to the satisfaction of the court that conditions exist which make such proceedings admissible under article 60, A. G. N., or independently of that article (17 Ann. Cas., 76, 106; 8 Id., 466), the judge advocate should take the stand as a witness, identifying the record and stating that he desires to read therefrom so much of the proceedings as embodies the testimony of a particular witness with reference to a particular part in issue. He should then present the record to the opposite party and to the court for inspection and opportunity to interpose objection to its admission. If there be no valid objection offered, the judge advocate should proceed to read the questions and answers from the record of the witness's testimony before the court of inquiry, subject to objection in the same manner as objection might be made to a witness actually on the stand. (C. M. O. 46, 1917, 16.)
9. **Method of introducing the proceedings of boards of investigations**—When it is decided by the court to receive in evidence the testimony of a witness before a board of investigation, the proceedings to be followed should be the same as that of introducing a court of inquiry proceedings in evidence. (People *v.* Qualey, 210 N. Y. 202; 104 N. E. 138; 39 Ann. Cas. 1108, 1111; 16 Cyc. 1106–1110; 2 Bishop's New Criminal Procedure, sec. 1199; C. M. O. 46, 1917, 19.)
10. **Note improperly admitted**—Indentity of handwriting not having been proved. (C. M. O. 17, 1920, 1.)
11. **Official correspondence**—It is improper to introduce into evidence for the purpose of establishing the guilt of the accused, official correspondence, such as letters transmitting the charges and specifications to the court. (File 26251–25761, 11 Nov., 1920; G. C. M. Rec. No. 50273; C. M. O. 133, 1920, 13.)
12. **Official correspondence**—The prosecution sought to introduce into evidence two letters, one from the mother of the accused to the Bureau of Navigation asking for clemency, the other from the accused, while in a penitentiary in Canada, to the Secretary of the Navy stating that the accused had deserted from the Navy and asking to be extradited and given another chance. The first letter was clearly inadmissible because the author was not under oath and subject to cross-examination. (N. C. and B., 1917, sec. 168.) The only ground upon which the second letter would be competent is as a confession, but before a confession is admissible the corpus delicti must be established. In this case no proper foundation had been laid. The most vital objection to the introduction of the second letter, however, is the fact that it was not proved that the accused had actually written the letter. The court in ruling on the objection of the counsel for the accused to admitting into evidence these letters stated: "The fact they are sent by the department to the judge advocate must be accepted as prima facie reasons for admitting them in the first instance." It should be obvious that by the mere sending of letters through official channels to the judge advocate, the department can not ipso facto nullify the rules of evidence. The department furnishes the judge advocate with all information available to enable him to prepare the case for prosecution. That this information must be used in a proper manner is elementary. (File 26251–23320, J. A. G., 19 May, 1920; G. C. M. Record. No. 47564; C. M. O. 76, 1920, 13.)
13. **Official correspondence**—(C. M. O. 2, 1921, 20.)

14. **"Oral testimony can not be obtained"**—The following rules are established for the guidance of courts-martial with reference to this condition, and are not intended to be unalterable or exclusive: (1) All testimony may be regarded as unobtainable (*a*) in the cases of civilian witnesses who are beyond the reach of compulsory process which the judge advocate is authorized to issue. In such cases it should appear that subpœnas intended to secure the voluntary attendance of such witnesses have been forwarded to the Secretary of the Navy, as provided by the Naval Courts and Boards, 1917, section 124, and that such action has for any reason failed to produce their appearance at the trial. (*b*) In cases of persons in the naval or military service whom the judge advocate is not authorized to summon (Naval Courts and Boards, 1917, sec. 123). In such cases it should appear that summons of such witnesses have been forwarded to the Secretary of the Navy or other convening authority, as provided in Naval Courts and Boards, 1917, section 123, and that such action has for any reason failed to produce appearance at the trial.

    (2) Oral testimony may be regarded as unobtainable in the case of a witness who has died, or has become insane, or by the opposite party is kept out of the way, or is too ill or infirm to come to the court. (2 Bishop's New Criminal Procedure, sec. 1195; C. M. O. 46, 1917, 14.)

15. **"Oral testimony can not be obtained"**—The court is the judge of how much evidence shall be received with reference to any particular fact, and where in any case it is considered that sufficient evidence has already been introduced, it will properly hold that the case is not one in which "oral testimony can not be obtained" as to that fact, and it will accordingly refuse to admit the proceedings of the court of inquiry with reference thereto, notwithstanding that such proceedings may contain the testimony of a witness as to such fact, whose personal attendance before the court can not be obtained. (C. M. O. 46, 1917, 14.)

16. **Proceedings of boards of inquest**—The proceedings of boards of inquest may be used in evidence before courts of inquiry and courts-martial under the same circumstances as in cases of testimony before boards of investigation not given under oath. If, in the future, boards of inquest should be authorized to administer oaths to witnesses, the subsequent use of testimony as given under oath would be governed by the same principles as the use of testimony before boards of investigation given under oath. (C. M. O. 46, 1917, 19.)

17. **Records of proceedings of courts of inquiry**—As a condition precedent to the introduction into evidence of the records of proceedings of courts of inquiry, the following conditions must obtain: (1) That such proceedings must be "duly authenticated by the signature of the president of the court and of the judge advocate;" (2) that the case in which the proceedings are received in evidence must be one "not capital;" (3) that the case in which the proceedings are received in evidence must be one not "extending to the dismissal of a commissioned or warrant officer;" (4) that "oral testimony can not be obtained." (C. M. O. 46, 1917, 13.)

18. **Refreshing the memory of a witness**—If a witness after examining the record, testifies from his own independent recollection of the fact, the record itself can not be introduced in evidence or read to the court. But if the witness has no independent recollection but testifies merely from his knowledge or belief in the accuracy of the record, the court of inquiry record becomes a part of his testimony, just as if without it the witness had orally repeated the words from memory, and may therefore be read aloud by him and shown to the court or otherwise put in evidence. (40 Cyc. 2467; 1 Greenleaf, 16 Ed., sec. 439; C. M. O. 46, 1917, 16.)

19. **Self-incrimination**—If it appears that the accused while a witness before a court of inquiry was required to give evidence tending to incriminate himself, after properly claiming his privilege against that incrimination, the testimony thus adduced can not be given in evidence against him at his trial. (C. M. O. 46, 1917, 15.)

20. **Self-incrimination**—If the accused testifies voluntarily before a court of inquiry, answers given by him within the scope of legitimate cross-examination, although under compulsion, are admissible in evidence against him at his trial. (Powers *v.* U. S. 223, U. S. 303, 314.) If the accused was improperly required to testify as a witness before a court of inquiry, in disregard of the act of March 16, 1870 (20 Stat. 30), the testimony so given can not be used against him at the trial. (C. M. O. 46, 1917, 15.)

21. **Signatures in, purporting to be those of the accused**—An accused was charged with and found guilty of "Desertion" and "Fraudulent enlistment." The judge advocate in endeavoring to establish the identity of the accused testified that the signature appearing in the service record book of X purported to be that of the accused

and that the signature on the shipping articles of Y appeared to have been written by the same person, but no authentication of either of these signatures as that of the accused was introduced into evidence. While it is not necessary that a witness qualify as a handwriting expert before he may express an opinion as to the genuineness of handwriting, it is essential in the absence of such qualifications that competent evidence be introduced to show that the witness is familiar with the handwriting in question, before his opinion can be accorded any weight, and the more familiar the evidence shows him to be with the handwriting in issue, the more weight the court should give his testimony. It has been held that where a witness has seen a person sign his name but once, such witness is qualified to express an opinion of the genuineness of the handwriting in question. (Greenleaf on Evidence, p. 723, par. 577.) In the instant case the judge advocate had not qualified in any way whatever as being familiar with the handwriting of the accused. There was, therefore, no evidence to prove that the service record of X and the shipping articles of Y were those of the accused, and until they had been shown to be his, they were irrelevant to the issue being tried. (File 26251–22757, J. A. G., 1 Apr., 1920; G. C. M. Rec. No. 47076; C. M. O. 74, 1920, 13.)

22. **Use of courts of inquiry records independently of article 60, A. G. N.**—Instances in which the proceedings of courts of inquiry may be used in evidence are: (*a*) Where it is expressly agreed by the accused that the proceedings of the court of inquiry be admitted as evidence on his trial, each party to have the privilege of introducing other evidence (Mullan *v.* U. S., 212 U. S. 516; C. M. O. 41, 1888, 5–6). (*b*) Where the proceedings of the court of inquiry are offered in evidence by the accused in his own behalf and received by the court—for the right of the accused to be confronted with the witnesses against him at his trial is one which he may waive (Ibid; Diaz *v.* U. S., 223 U. S. 442). (*c*) Where the accused has previously testified voluntarily before a court of inquiry, such testimony is admissible when offered by the prosecution at his trial, and it is not essential to admissibility of the testimony that he should have been warned by the court of inquiry that what he said might be used against him (Powers *v.* U. S. 223, U. S. 303, 313). (*d*) Where a witness before a court-martial has made prior inconsistent statements before a court of inquiry, proceedings of a court of inquiry may be introduced in evidence for the purpose of impeaching the testimony of such witness, subject to the rules of evidence requiring that a proper foundation be laid before evidence may be introduced to impeach the testimony of a witness by showing prior inconsistent statements (Naval Digest, 1916, p. 132, sec. 19; p. 284, sec. 10). (*e*) Any witness testifying before a court-martial may, in the discretion of the court, refresh his memory from the records of the testimony given by him before a court of inquiry. (40 Cyc. 2456, 2457, 2466.) (C. M. O. 46, 1917, 15.)

23. **Weight of court of inquiry proceedings as evidence**—The weight to be attached by the court-martial to proceedings of a court of inquiry which have been received in evidence is a matter for determination by the court, the same as in the case of any other evidence. In this connection see Mullan *v.* U. S., 42 Ct. Cls. 157, 176; affirmed in 212 U. S. 516, 520. (C. M. O. 46, 1917, 17.)

24. **Where the original is a public document or record, and a copy is introduced, it must be duly authenticated under the seal of the department.** (C. M. O. 2, 1921, 20.)

EXAMINING BOARDS.

1. **Examination of acting pay clerks.** *See* PAY CLERKS, ACTING.
2. **Waiver of right to appear in person, effect of.** (C. M. O. 9, 1921, 14.)

EXHIBITS.

Manner of marking—If they are evidence of matter in issue, they should be marked "Exhibit No. —." If they are matter of collateral interest to the case they should be marked "A," "B," "C," etc. (File 12821–186, J. A. G., 25 May, 1920; C. M. O. 76, 1920, 18.)

EXIGENCIES OF THE SERVICE.

1. **Ground for denying new trial.** (C. M. O. 109, 1919.)
2. **Court**—Should be composed of officers not cognizant of the circumstances attendant upon the offense for which an accused may be brought to trial, exigences of the service permitting. (C. M. O. 138, 1919.)
3. **Court**—Not reconvened on account of, although sentence adequate for offense found proved. (C. M. O. 61; 97; 1919.)

EXTENSION OF ENLISTMENT. *See* ENLISTMENTS, MINORITY ENLISTMENT, EXTENSION.

EXTENSION OF ENLISTMENT FOR "DURATION OF WAR." (C. M. O. 7, 1921, 16.)

EXTRADITION. Right to demand before removal from State. (C. M. O. 304, 1919, 13.) *See* CIVIL AUTHORITIES.

FALSE SWEARING.

Perjury—Since the act of March 4, 1909 (35 Stat. 1111), false swearing and perjury are synonymous. *See* Naval Digest, 1916, "Perjury," 7.

FAMILY ALLOWANCES.

Class A beneficiaries need not be financially dependent—Under the act of 6 October, 1917, the financial dependence on the enlisted man of class A beneficiaries (wife, former wife divorced, and child or children) is in nowise a factor in or condition of the grant of a family allowance to them, and it would be improper and illegal for the Government to disallow a family allowance to such beneficiaries because they are not so dependent. Such action could not legally be justified under the portion of section 201 of the act which permits exemption "for good cause" from the allotment. Family allowances to class B beneficiaries, however, are paid under the terms of section 206 of the act "only if and while the member is dependent in whole or in part on the enlisted man." (File 28909-85, J. A. G., 18 Mar., 1918; C. M. O. 30, 1918, 28.)

FIGURES.

Identification—Use of in charges and specifications. (C. M. O. 304, 1919, 16.) *See* CHARGES AND SPECIFICATIONS.

FINANCIAL DEALINGS BETWEEN OFFICERS AND ENLISTED MEN.

Prohibition applies to officers and not to enlisted men. (C. M. O. 293, 1919, 4.) *See* DONATIONS AS GIFTS.

FINDINGS.

1. **Abbreviations in, are improper.** *See* ABBREVIATIONS.
2. **Alias.** *See* ALIAS.
3. **"Due form and technically correct"**—Where the court finds that the charges and specifications are in due form and technically correct, it in effect finds that the specification supports the charge; therefore should the court find the specification of a charge proved, but the accused not guilty of the charge, the finding is inconsistent with the previous action. (File 26262-739, J. A. G., 5 Jan., 1918; C. M. O., 4, 1918, 15.)
4. **Exceptions and substitutions**—An accused was tried and found guilty of the charge of theft, the specification alleging that at a certain specified time and place he did "* * * feloneously take, steal, and carry away * * * a jumper * * * $5.25 in value, the property of ——— ———, seaman, second class, U. S. Navy * * *." The court found the specification proved except the words "the property of ——— ———, seaman, second class, U. S. Navy * * *," and did not substitute an allegation stating in whom the property right of the jumper was vested. The court fatally erred in its findings in excepting the words "the property of ——— ——— seaman, second class, U. S. Navy, * * *" and not substituting therefor an allegation that the jumper was the property of a certain person or a person unknown. "In an indictment for larceny the ownership of the property must be alleged * * *." (25 Cyc. 88.) The purpose of this is to negative any right to possession on the part of the accused and to describe the property as definitely as possible so as to effectually protect the accused against a second prosecution based upon the same transaction. (See Winthrop's Military Law and Precedence, p. 580; Naval Courts and Boards, 1917, sec. 320.) (File 26262-7209, J. A. G., Feb. 25, 1920; G. C. M. Rec. 46600; C. M. O. 60, 1920, 16.)
5. **Guilty**—Same act constituting two offenses; court should impose punishment only with reference to the act or omission in its most important aspect. (C. M. O. 185, 1919.)
6. **Charge not supported by specifications as found proved.** (C. M. O. 10, 1921, 9.)
7. **Inconsistent.** (C. M. O. 2, 1921, 21.)
8. **Inconsistent**—A court found the charges and specifications in due form and technically correct; at the conclusion of the trial it found the specification proved and the accused not guilty of the charge. *Held*, the action of the court to be contradictory and inconsistent. (C. M. O. 82, 1917, 1.)

9. **On an improper use of a specification**—An accused was tried by general court-martial for a certain offense. A form of specification intended for trial in joinder was improperly used by the convening authority. The court recorded its findings in part, as follows: "The specification proved in part, proved except the words 'A——— B———, chief water tender,' which words are not proved and for which the court substitutes the words 'a person unknown' which words are proved," and acquitted the accused of the charge. A——— B——— was the accused, and for the court to find the specification proved against some person other than the accused was most irregular. If from the evidence adduced, the accused was innocent of the allegations set forth in the specifications, the findings upon the same should have been "not proved." (File 26262-4074, J. A. G., 12 Mar., 1918; G. C. M. Rec. No. 37193; C. M. O. 30, 1918, 21.)
10. **"Proved, but without culpability"**—A court found "The specification of the second charge 'proved, but without culpability,'" the accused not guilty of the charge and the court accordingly did fully acquit the accused of the second charge. In approving the proceedings, findings, and sentence, the convening authority remarked that the comments contained in the Naval Digest, 1916, page 242, section 69, were applicable to the form of finding in this case. (C. M. O. 54, 1917.)
11. **Right of interested party to be furnished with findings.** *See* BOARD OF INVESTIGATION.
11. **Specification alleging essential date**—Where a specification alleges that the accused surrendered himself on or about 31 August, 1917, and the evidence clearly shows that the date was 28th of that month the court should properly find the date "not proved" and substitute therefor the date established by the evidence. This irregularity, however, is not so serious as to invalidate the proceedings. (File 26251-14552, J. A. G., 27 Dec., 1917; C. M. O. 88, 1917, 14.)
12. **Specification proved in part or not proved**—"Specification proved in part" is the proper form where the allegations found proved place upon the accused criminal liability to a less degree than charged. But where no offense is proved by the evidence adduced, the proper finding is "the specification not proved." (C. M. O. 46, 1920.)
13. **Substitution**—An accused was tried on the charge of "Through negligence suffering a vessel of the United States to be lost by fire," and by reason of substitution made by the court of other words for those contained in the specifications, he was found guilty of failures and negligence, or neglect, as a consequence of which "adequate measures were not taken to prevent the spread of flames and the consequent destruction of the ship." (Naval Digest, 1916, p. 239, par. 27.) The substitutions made by the court in the case in question resulted in rendering the specifications inadequate to support the charge on which the accused was tried. A substitution must not so modify the specifications as to render them inappropriate or inadequate to support the charge of which the accused is found guilty. (C. M. O. 27, 1896, 2.) The findings therefore, were illegal. (C. M. O. 23, 1918, 4.)

FINDING OF GUILTY IN LESS DEGREE THAN CHARGED.

Specific offense found proved should be stated—It is fatally irregular for the court to find the accused guilty of a charge in a less degree than charged, without stating specifically the offense of which he was found guilty. (File 26262-4311, G. C. M. Rec. 28021; C. M. O. 71, 1918.)

FINES.

Refund of—Information having been requested as to the right of refund of court-martial checkages in the cases of members of the Naval Reserve Force who have been transferred to the regular Navy, the department expressed the following views: The act of 11 July, 1919, authorizing the transfer of enrolled men of the Reserve Force to the Navy provides "That enrolled men so transferred shall be entitled to and receive the same pay, rights, privileges, and allowances, in all respects as now provided by existing law for men regularly discharged and reenlisted immediately upon expiration of their full four-year enlistment in the regular Navy or Marine Corps." One of the rights to which a man is entitled when discharged from four-year enlistment is the refund of court-martial checkages which were remitted by the convening authority subject to the provisions of article 4893, Naval Instructions, 1913. The department held that enrolled men of the Naval Reserve Force transferred to the regular Navy under the provisions of the act of 11 July, 1919, are entitled to the refund of court-martial checkages which were remitted subject to article 4893, Naval Instructions, 1913. (File 26803-112; J. A .G., 11 Dec., 1919; C. M. O. 321, 1919, 15.)

FLAG.

1. *See* PENNANT.
2. **On private vessels**—"The Secretary of the Navy shall prescribe a suitable flag, or pennant, that may be flown as an insignia on private vessels or vessels of the merchant service commanded by officers of the Naval Reserve Force: *Provided*, That it shall not be flown in lieu of the national ensign." (Compiled Statutes, Title XV, ch. 7, 2900-1-2a (25). (C. M. O. 76, 1920, 19.)

FLEET COMMANDERS.

Captains or above may command as vice admirals or admirals. *See* COMMAND, FLEETS AND SQUADRONS.

FLEET MARINE CORPS RESERVE.

Members desiring to return to regular service. *See* FLEET NAVAL RESERVE.

FLEET NAVAL RESERVE.

1. *See also* NAVAL RESERVE FORCE.
2. **Classes 1-C and 2-D, may accept civil service positions**—While on inactive duty, even though the salary of such position and their retainer pay combined amount to more than $2,000 per annum. They are eligible for appointment to such positions as long as it in no way interferes with their duties as members of the Fleet Naval Reserve, for the reason that Congress has expressly stated that "no existing law shall be construed to prevent any member of the Naval Reserve Force from accepting employment in any branch of the public service except as an officer or enlisted man in any branch of the military service of the United States or any State thereof, nor from receiving the pay and allowances incident to such employment in addition to his retainer pay." (39 Stat. 521.) (File 28550-1358, J. A. G., 16 June, 1920; C. M. O. 85, 1920, 15.)
3. **Conditions under which a member of the regular Navy may be transferred to**—The act of 29 August, 1916, provides the only way in which such transfer may be effected, viz.:

   "In addition to the enrollments in the Fleet Naval Reserve above provided, the Secretary of the Navy is authorized to transfer to the Fleet Naval Reserve at any time within his discretion any enlisted man of the naval service *with twenty or more years' naval service*, and any enlisted man, at the expiration of a term of enlistment who may be then entitled to an honorable discharge, *after sixteen years' naval service: Provided*, That such transfers shall only be made upon voluntary application and in the rating in which then serving, and the men so transferred shall be continued in the Fleet Naval Reserve until discharged by competent authority." (File 28550-123: 9, J. A. G., 17 June, 1919; C. M. O. 209, 1919, 23-24.)
4. **Confirmation of officers of.** (C. M. O. 114, 1919, 16.)
5. **Construction of "naval service"**—Previous service in the Marine Corps in the case of a man honorably discharged from the Navy can be construed as "naval service" and permit of his enrollment at the rate of pay allowed by law for men with 8 and 12 years' service, respectively, in the Fleet Naval Reserve. For the purpose of permitting men with 16 and 20 years' service, respectively, to transfer to the Fleet Naval Reserve, previous service in the Marine Corps may be construed as "naval service," in computing their 16 or 20 years' service in the Navy, but previous service in the Army can not be so construed. For the purpose of determining the 30 years' service necessary for retirement, all service should be counted, namely, Army, Navy, Marine Corps, active Naval Reserve service as referred to in the act of March 3, 1916 (38 Stat. 940), and Fleet Naval Reserve service in the cases of men transferred to and retired from the Fleet Naval Reserve. Members of the Fleet Naval Reserve upon retirement are entitled to have war service "computed as double time in computing the 30 years necessary to entitle" them to be retired in accordance with the Navy personnel act of March 3, 1899 (30 Stat. 1008). (File 26254-2114, Sec. Navy, Oct. 16, 1916; C. M. O. 37, 1916, 7.)
6. **Continuous service for transfer.** *See* CONTINUOUS SERVICE.
7. **Deposit of enlisted men**—Deposits with interest of enlisted men of the naval service transferred to the Fleet Naval Reserve under the provisions of the act of August 29, 1916, must be paid to them at the time they are so transferred. (File 28550-22, Sec. Navy, Nov. 23, 1916; C. M. O. 41, 1916, 7.)

8. **Dismissed officers and midshipmen subsequently pardoned may not enroll**—In the Acting Attorney General's opinion of 15 February, 1918, to the Secretary of the Navy (File 26282-326: 2) it was held that an officer of the Navy who has been dismissed by sentence of court-martial and subsequently pardoned for the offense for which dismissed is not eligible for reappointment in the Navy or to membership in the Fleet Naval Reserve, in view of section 1441 of the Revised Statutes; section 21 of the act of February 16, 1914 (38 Stat. 283, 290); and the provisions of the act of August 29, 1916 (39 Stat. 589). The Acting Attorney General's opinion, therefore, applies to the cases of former midshipmen, as well as to other former officers of the United States naval service. (File 26282-287:4, J. A. G., 16 Mar. 1918; C. M. O. 30, 1918, 29.)
9. **Furlough between periods of service**—Will an enlisted man, who had enlisted in 1904, was discharged the last time in 1916, reenlisted June 27, 1916, and on September 20, 1916, was given an indefinite furlough, was recalled to active duty on 11 April, 1917, and is due for discharge on June 26, 1920, be eligible for transfer to the Fleet Naval Reserve with 16 years' continuous service?

   Held, That in view of the decisions defining the status of enlisted men while on furlough and holding that the recall from furlough to active duty restores an enlisted man to all rights and privileges under his contract of enlistment as though no break in his enlistment service had occurred, the man in question is eligible for transfer to the Fleet Naval Reserve upon the expiration of his present term of enlistment as of 16 years' naval service, provided he is then entitled to an honorable discharge, and that when so transferred he is entitled to continuous-service pay as of 16 years' naval service. (File 28550-13: 55, Sec. Navy, 9 June, 1920; C. M. O. 85, 1920, 24.)
10. **Good conduct medal awarded to members of the Fleet Naval Reserve.** *See* GOOD CONDUCT MEDAL.
11. **Members desiring to return to the regular service**—An enlisted man, who, on the date of the expiration of his enlistment and after having served 16 years in the Navy, was transferred to the Fleet Naval Reserve, and shortly thereafter desired to return to the regular service. *Held*, he is entitled to receive a discharge from the Fleet Naval Reserve and also from the Navy prior to again enlisting. (File 28550-47, J. A. G., Apr. 17, 1917; C. M. O. 32, 1917, 6.)
12. **Reenlistment**—Within four months from date of transfer.

    In his decision of 28 March, 1917 (23 Comp. Dec. 535), the Comptroller held, quoting from the syllabus:

    "An enlisted man of the Navy who, at the expiration of his term of enlistment, is not discharged therefrom, but, under the provisions of the act of August 29, 1916, is transferred to the Fleet Naval Reserve, and who, within four months after the date of expiration of such term of enlistment, is discharged from the Fleet Naval Reserve and reenlisted for four years in the regular Navy, is entitled, in an otherwise proper case, to honorable-discharge gratuity and to continuous-service pay." (File 29199-5, Sec. Navy, June 5, 1920; C. M. O. 85, 1920, 15.)
13. **Stationed in Naval Hospital**—The retainer pay of all members of the Fleet Naval Reserve, not on active duty, and while in a naval hospital for treatment, should be checked the value of a ration for each day therein, and the same should be credited to the naval hospital fund. In cases where a member of the Fleet Naval Reserve is on active duty, he would be entitled to rations or commutation therefor, and while in a hospital he should be treated in the same manner as any other officer or enlisted man of the naval service. (File 28550-23, J. A. G., Nov. 24, 1916; C. M. O. 41, 1916, 6.)
14. **Temporary appointment in regular Navy.** *See* APPOINTMENT, TEMPORARY.

FLYING.

Officers detailed to duty involving. (C. M. O. 8, 1921, 17.)

FOREIGN LANGUAGE.

Orders given in—One could not be guilty of wilfully disobeying, which he did not understand. (C. M. O. 208, 1919, 7.)

FORGING A SIGNATURE FOR THE PURPOSE OF OBTAINING PAYMENT OF A CLAIM AGAINST THE UNITED STATES.

Not proper charge where the forging of an indorsement on a Government check is not a "claim." (C. M. O. 1, 1920, 2.)

FORMER JEOPARDY.

1. *See also* JEOPARDY FORMER.
2. **Previous trial on defective specification**—An accused was arraigned before a summary court-martial and pleaded a fatally defective specification. The court sustained the plea. Later, the same accused was arrained before the same summary court-martial for the same offense, but properly alleged in the specification. The accused pleaded former jeopardy. *Held,* it was not a good plea because the previous trial was on a fatally defective specification and the trial had not advanced to a final conviction or acquittal. (File 26287-3475; C. M. O. 22, 1916, 6.)
3. **Trial on defective specification as affecting**—*Held,* When accused made no objection to being tried on a fatally defective specification and the court acquitted him of the charge, he could not lawfully be brought to trial again for the same offense. (C. M. O. 39, 1919, 17.)
4. **Trial of person in naval service by Federal civil authorities for offenses against United States**—Bars subsequent trial by naval authorities for same offense. (C. M. O. 237, 1919, 21.)
5. **What constitutes**—Where the accused has once been tried and acquitted or convicted by a court of competent jurisdiction he can not again be brought to trial for the same offense, even though the specification on which he was previously tried was substantially bad, unless he objected at the time of the first trial to the insufficiency of the specification (United States *v.* Ball, 163 U. S. 662; Kepner *v.* United States, 195 U. S. 100, 129; Serra *v.* Mortiga, 204 U. S. 470), or expressly requests a new trial or otherwise waives the right to avail himself of the plea. (10 Op. Atty. Gen. 233.)

   Under the practice, both in the Army and the Navy, it seems to have been long settled that where the accused has once been duly acquitted or convicted, he has been "tried" in the sense of the Articles of War and the fifth amendment of the Constitution, although no action may have been taken upon the findings or proceedings by the reviewing authority, "Nor has he been any the less 'tried' where the finding has been formally disapproved by such authority. For the finding is no less a consummation in law of the trial, though ,from a cause beyond the control both of the accused and the court, such finding has been rendered ineffectual." (1 Winthrop's Military Law and Precedence, 390; Naval Courts and Boards, 1917, sec. 298.) (File 26252-5117; G. C. M. Rec. No. 40139; C. M. O. 141, 1918, 21. *But see* File 26251-27573, J. A. G., 4 Oct., 1921; C. M. O. 10, 1921, 11-20.)

FORMER MEMBER OF THE SERVICE.

Conviction five years subsequent to the offense and a preferring of charges and specifications. *See* DESERTION.

FORMER MIDSHIPMAN APPOINTED FROM ENLISTED PERSONNEL.

Examination for reappointment. (C. M. O. 8, 1921, 17.)

FORMER OFFICER.

Former officer tried upon a charge preferred against him while an officer of the Navy. (C. M. O. 26, 1917.)

FORMER TEMPORARY OFFICERS.

Retirement of. (C. M. O. 7, 1921, 19.)

"FRAME UP."

Findings and sentence disapproved—Because of the possibility that the charges against the accused were inspired by a spirit of revenge for his conscientious performance of duty. (C. M. O. 54, 1920.)

FRAUD.

Essential elements—"The general rule governing the essential elements of fraud is 'That to constitute actionable fraud it must appear (1) that defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist. The absence of any one of them is fatal to a recovery. A maxim announced in an early English case, and ever since recognized as correct, is that fraud without damage or damage without fraud is not actionable, but that where both concur, an action of deceit will lie.'" (Cyclopedia of Law and Procedure, vol. 20, p. 13.) (C. M. O. 67, 1917, 14.)

FRAUD AGAINST THE UNITED STATES.

What constitutes, under Article 14, Articles for the Government of the Navy—

Article 14 of the Articles for the Government of the Navy provides, in part, as follows:

"Fine and imprisonment, or such other punishment as a court-martial may adjudge, shall be inflicted upon any person in the naval service of the United States.

* * * * *

"3. Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures or advises the making, or use of, any writing or other paper, knowing the same to contain any false or fraudulent statement;

* * * * *

"10. Who executes, attempts, or countenances any other fraud against the United States."

Each section of this article, with the single exception of section 10 as last quoted, distinctly sets forth that the frauds therein contemplated consist only in the presentation of any claim against the United States, knowing such claim to be false or fraudulent, or where the intent of the frauds contemplated is to defraud the United States either directly or through its officers by presenting any claim against the United States, knowing such claim to be false or fraudulent. The nature of the frauds arising under the Articles for the Government of the Navy has been further set forth in C. M. O. No. 4, 1916, as follows:

"There are two broad classes of fraud, viz, fraud against the United States and fraud not against the United States. The first class is punishable under article 14, A. G. N., and the other under article 8, A. G. N."

Frauds, therefore, arising under article 14, Articles for the Government of the Navy, have a perfectly distinct character, the essential element of which is the defrauding of the United States, or that the act was committed with the intent to defraud the United States, whereby they have either suffered a financial or property loss or might possibly have suffered such a loss through the fraud contemplated.

In construing section 10 of article 14, Articles for the Government of the Navy, the question arises whether "or countenances any other fraud against the United States" is intended to include all frauds executed, attempted, or countenanced against the United States by any person in the naval service, or whether it is limited in its scope to frauds of like character to those described in the preceding paragraphs of this article. Referring to section 1624 of the Revised Statutes of the United States, which includes article 14, Articles for the Government of the Navy, it is noted that it refers to the act of 17 July, 1862, 12 Stat. 602, article 7, paragraph 6, which is as follows:

"Or shall knowingly make or sign, or shall aid, abet, direct, or procure the making or signing of any false muster, or shall execute or attempt or countenance any fraud against the United States, * * *."

Comparing the words "or countenance any other fraud against the United States," as set forth in the Revised Statutes, with the words "or countenance any fraud against the United States," as set forth in the original act, and keeping in mind that the compilers of the Revised Statutes were fully informed as to the provisions of the original act, it is apparent that the word "other" must have been inserted in this clause for a purpose. Referring to the rules for interpreting the Federal Statues of the United States, the rule of *ejusdem generis* is set forth as follows:

"While unqualified general terms are usually to be given their natural and full signification, yet when general words follow in a statue words of particular and special meaning, if there be not a clear manifestation of different legislative intent, they are construed as applicable to persons and things, or cases of like kind, as are designated by the particular words. (42 Fed. Rep. 22, 16 Op. Atty. Gen. 353.) This rule, which is sometimes called Lord Tenterden's rule, has been stated as to the word 'other' thus: Where a statute enumerates several classes of persons or things and immediately following and classed with such enumeration the clause embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that persons or things therein comprised may be read as ejusdem generis with, and not a quality superior to or different from, those specifically enumerated." (2 How. 20; 3 Wheat. 390; and 85 Fed. Rep. 41; Fed. Stats. Ann., vol. 1, p. LXVIII.)

Applying this rule to the word "other" as inserted by the compilers of the Revised Statutes in the clause "or countenance any fraud against the United States," as found in the original statue, it is evident that said compilers intended to restrict the clause to those kinds of fraud specifically enumerated in the foregoing paragraphs of section 1624, Revised Statutes.

It is a well-known principle of statutory construction that penal statutes are to be construed strictly, are never to be extended against the interests of the defendant, and in order to determine that a case is within the terms of a penal statute the language thereof must authorize it in a clear and unmistakable manner. Chief Justice Marshall in speaking upon this point said: "* * * It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases." (5 Wheat. 96; *see also* upon this point 151 U. S., 164, U. S. 683; 79 Fed. Rep. 64; 17 Op. Atty. Gen. 419.) In speaking upon this point Chief Justice Fuller said: "There can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute." (134 U. S. 624.) Justice Betts said: "Courts will not give an equitable construction to a penal law, even for the purpose of embracing cases clearly within the mischief intended to be remedied." (1 Blatchf. (U. S.), 156.) Also Justice Brown said that a penal statute "must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial." (175 U. S., 265.)

Applying the rule of ejusdem generis in this case, and the rule for interpreting penal statutes as above set forth, the only tenable conclusion is that the word "other" restricts the application of section 10, article 14, Articles for the Government of the Navy, to "other like frauds." Since Congress as well as the compilers of the Revised Statutes must be presumed to have been fully aware not only of the original act of July, 1862, but also of the rule of ejusdem generis and the rule governing the interpretion of penal statutes, it is evident that they intended to restrict this clause to "other like frauds," and, as stated by the Attorney General, "it was unnecessary to quote a judicial decision for the purpose of proving that all written laws are to be construed according to the intention of the legislature, for that is a fundamental principle which nobody denies." (9 Op. Atty. Gen. 472.) Referring to section 5596 of the Revised Statutes, it will be noted that "all acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision are hereby repealed, and the section applicable thereto shall be enforced in lieu thereof: all parts of such acts not retained in such revision having been repealed or superseded by subsequent acts or not being general and permanent in their nature; * * *." From this it is evident that paragraph 6 of article 7 of 17 July, 1862, has been repealed by section 10, article 14, of the Articles for the Government of the Navy, and that said section refers only to frauds of a nature similar to those provided for in the foregoing section of said articles. (File 26262-3363, G. C. M. Rec. No. 41585; C. M. O. 190, 1918.)

FRAUDULENT ENLISTMENT.

1. *See* DESERTION.

2. **Effect of department's action directing that no disciplinary action be taken—** An enlisted man who had received a bad conduct discharge from the Navy in 1909, fraudulently enlisted under an assumed name in April, 1917. The department directed that he be informed that no disciplinary action would be taken in his case but that he would be placed on probation for a period of one year and that during that time, if his conduct warranted, he would be summarily discharged with an undesirable discharge. Upon being brought to trial on several charges, *inter alia*, that of fraudulent enlistment, the accused, by his counsel, pleaded former jeopardy and constructive pardon. *Held*, That the President has the sole power of pardon in such a case, and not having exercised it, the mere restoration to duty by the department in no wise operates as a constructive pardon. (Naval Digest 1916, p. 445, sec. 47.) *Held, further*, That there had been no trial whatever in this case, and there could be therefore, no former jeopardy. *Held, further*, That as the offense of fraudulent enlistment was knowingly passed over by the department it should not, under the circumstances be brought into the question. (File 26351-15021; 5, Sec. Navy, 2 Apr., 1918; G. C. M. Rec. No. 37874; C. M. O. 37, 1918, 17.)

3. **Necessary allegations**—Fraudulent enlistment is made an offense by the act of 3 March, 1893, which states:

"Fraudulent enlistment, and the receipt of any pay and allowance thereunder, is hereby declared an offense against naval discipline and made punishable by general court-martial, under article twenty-two of the Articles for the Government of the Navy." (27 Stat. 716.)

When an accused is not in the service at the time of procuring the alleged fraudulent enlistment, the gist of the offense is the receipt of pay and allowances under the fraudulent enlistment, which act is committed after the offender has completed a contract (binding as to himself though voidable by the Government), whereby he has submitted himself to naval jurisdiction, and not the act of making false representations prior to his acceptance.

When, however, an accused who is in desertion, and subject to the jurisdiction of the Navy, fraudulently enlists, the department has held, that the charge would be sustained by proof of his having procured enlistment by fraudulent representations, proof of the receipt of pay and allowances not being necessary in such cases.

It is a good rule in all cases of fraudulent enlistment, where there is any possible doubt as to the status of the accused, to allege and prove the receipt of pay and allowances under said fraudulent enlistment. (*See* C. M. O. No. 17, 1916, 7–9.)

4. **One who conceals nothing upon entry into the naval service can not be guilty of**—The accused in a recent case, in defense to the charge of "Fraudulent enlistment," swore that at the time of his enrollment in the Naval Reserve Force he had concealed nothing, but, on the contrary, had made out a paper on which he stated that he had been in the naval service and had been discharged therefrom with a bad-conduct discharge. The testimony of the accused was later verified by communicating with the recruiting office where the accused had enrolled. In view of the above it was held that the accused was innocent of the offense of "Fraudulent enlistment," of which he had been convicted, and the findings of the court on said charge were set aside by the department. (File 26251–18552; G. C. M. Rec. No. 41608; C. M. O. 77, 1919, 16.)

5. **Right of guardian to custody of minor**—A minor under the age of 18 years, having no legally appointed guardian, swore falsely on enlistment that his age was over 18 years, and was then enlisted in the Navy. A person who has stood *in loco parentis* of the minor from childhood, was thereafter legally appointed his guardian and demanded his discharge from the Navy. *Held*, That said guardian was entitled to have the minor restored to his custody and control unless the Government could show just and legal right to such minor's services and custody. (Doane *v.* Burkeman et al., 190 Fed. 541.) As there were no disciplinary proceedings commenced against the minor it was further held that there was nothing by which the Government could show just and legal right to the custody of the minor. (File 7657–559, J. A. G., 16 Feb., 1918; C. M. O. 15, 1918, 18.)

FREEDOM OF SPEECH. *See* File 26251–12159, pp. 11, 19.

FURLOUGH.

1. **Commanding officer naval hospital may grant to convalescent patients as part of treatment.** (C. M. O. 39, 1919, 19.)
2. **Effect on right to transfer to Fleet Naval Reserve.** *See* FLEET NAVAL RESERVE.
3. **Enlisted men competing with civilians.** *See also* EMPLOYMENT.
4. **Treatment for enlisted men on furlough without pay.** *See* HOSPITAL.

FURLOUGH WITHOUT PAY.

1. **Act of August 29, 1916.** (39 Stat. 580–581.) (C. M. O. 41, 1916.)
2. **Deposits**—When an enlisted man is furloughed without pay for the unexpired portion of his enlistment, his deposit, if any, with interest, should be paid on the date furlough is granted. (C. M. O. 41, 1916, 7.)
3. Enlisted men of the Marine Corps as well as enlisted men of the Navy proper are within the purview of the act of August 29, 1916 (39 Stat. 580–581), authorizing the Secretary of the Navy to grant furloughs without pay for a period covering the unexpired portion of their enlistment. (File 7657–402, Sec. Navy, Nov. 21, 1916.)

When an enlisted man is furloughed without pay for the unexpired portion of his enlistment in accordance with the above act, his deposit, if any, with interest, should be paid on that date—that is, the date the furlough was granted. (File 7657–402; J. A. G., Oct. 18, 1916.)

An enlisted man on furlough without pay, as above indicated, is entitled to treatment in naval hospitals. (File 7657–411, J. A. G., Nov. 18, 1916; C. M. O. 41, 1916, 7.)

4. **Hospitals**—An enlisted man furloughed without pay is entitled to treatment in Navy hospitals. (C. M. O. 41, 1916, 7.)
5. **Marine Corps**—Enlisted men of the Marine Corps are within the purview of the act of August 29, 1916. (39 Stat. 580–581.) (C. M. O. 41, 1916, 7.)
6. **National emergency**—Enlisted men furloughed without pay shall be subject to recall in time of war or national emergency. (C. M. O. 41, 1916, 7.)
7. The authority for granting furloughs to enlisted men of the Navy is contained in the following provision of the act of 29 August, 1916:

"The Secretary of the Navy is hereby authorized to grant furlough without pay to enlisted men for a period covering the unexpired portion of their enlistment: *Provided*, That such furlough be granted under the same conditions and in lieu of discharge by purchase or by special order of the department. Enlisted men so furloughed shall be subject to recall in time of war or national emergency to complete the unexpired portion of their enlistment, and shall be in addition to the authorized number of enlisted men of the Navy."

In construing the above provision this office has heretofore held in its opinion of 5 February, 1917, "that enlisted men furloughed under the act of 29 August, 1916 (39 Stat. 580), clearly retain their status as enlisted men during the period of such furlough." (File 7657–411.) This view was approved by the department in its indorsement of 15 March, 1917, to the Chief of the Bureau of Medicine and Surgery. (File 7657–411:2.) (File 28550–1355, Sec. Navy, 9 June, 1920; C. M. O. 85, 1920, 23.)

8. In 25 Comp. Dec. 298, 299, in the case of an enlisted man who was recalled to active service while on furlough, the comptroller held:

"His recall to duty restores him to his former status as to pay and restores him to all rights and privileges under his contract of enlistment as though no break in his enlistment service had occurred, and when discharged upon the completion of the unexpired portion of his enlistment he becomes entitled to all rights and privileges attached thereto, such as travel allowance and four months' gratuity upon reenlistment within four months therefrom." (File 28550–1355, Sec. Navy, 9 June, 1920; C. M. O. 85, 1920, 24.)

GENERAL COURT-MARTIAL.

1. **Power to convene.** *See* JURISDICTION.
2. **Return of record for revision.** (C. M. O. 12, 1921, 9.)

GENERAL COURT-MARTIAL PRISONER.

Rations—The department on July 10, 1917, directed: "General court-martial prisoners will receive a ration in kind, except at those naval prisons where the Secretary of the Navy has authorized a commutation of the rations." Such authority has been granted to naval prisons at Portsmouth, N. H., Port Royal, S. C., Mare Island, Calif., and Cavite, P. I. (File 26267–175:2, Sec. Navy, July 10, 1917; C. M. O. 46, 1917, 21.)

GENDARMERIE.

Members of Marine Corps Reserve are eligible for such service. *See* MARINE CORPS RESERVE.

GENERAL ORDERS.

Judicial notice. *See* JUDICIAL NOTICE.

GEODETIC SURVEY.

Service in, for increased retainer pay. *See* NAVAL RESERVE FORCE.

GEOGRAPHY.

Judicial notice. *See* JUDICIAL NOTICE.

GIFTS.

1. **Donations as**—Prohibition against does not apply to enlisted man. *See* DONATIONS.
2. **From foreign city to naval officer**—Upon inquiry made to ascertain whether or not the captain of the U. S. S. * * * could accept a loving cup from a citizen of * * * without the consent of Congress, in recognition of his action in attacking an enemy submarine which bombarded that city, it was held, that the acceptance of said gift would not be a violation of article 1, section 9, clause 8, of the Constitution of the United States or of any law of the United States. (File 9644–43, J. A. G., 6 April, 1918; C. M. O. 37, 1918, 20.)
3. **Superior official, etc.** (File 23806–33, Sec. Navy, Nov. 9, 1909, quoted approvingly in File 26251–12159, Sec. Navy, Dec. 9, 1916, p. 14.)

GOOD CONDUCT MEDAL.

Awards to enlisted men transferred to Fleet Naval Reserve—An enlisted man who is in other respects entitled to a good conduct medal should not be deprived thereof when, at the expiration of a term of enlistment after having completed 16 or 20 years' naval service, he is transferred to the Fleet Naval Reserve. Such a medal may be awarded under such circumstances for his last enlistment in the active Navy of which he is not discharged, but is simply transferred to aforesaid reserve. (File 26517-7, sec. 80, Mar. 2, 1917; C. M. O. 22, 1917, 8.)

GRADE AND RANK.

Definition—Discussion of meaning of the term grade or rank as used in Revised Statutes, 1588. *See* Rutherford *v.* U. S. (18 Ct. Cls. 339); McClure *v.* U. S. (18 Ct. Cls. 347); Wood's case (15 St. Cls.; 20 J. A. G. 360.)

GUANTANAMO NAVAL STATION.

Agreement with Cuba—*See* Naval Digest, 1916, "Murder," 11.

GUILTY.

1. **Effect of such plea**—Is that of confession of offense, or admission of act as charged, and is the highest kind of conviction the case admits. (C. M. O. 35, 1920, 21.)
2. **Plea**—Plea of guilty not inconsistent with testimony of accused that he did not profit financially. (C. M. O. 78, 1917, 4.)

GUILTY IN A LESS DEGREE THAN CHARGED.

1. **"Culpable negligence and inefficiency in the performance of duty"**—The court found an accused guilty in a less degree than charged, guilty of "Culpable negligence in the performance of duty." (C. M. O. 19, 1916, 2.)
2. **"Fraud in violation of article 14 of the Articles for the Government of the Navy"**—Court found an accused guilty in a less degree than charged, guilty of "Conduct unbecoming an officer and a gentleman." (C. M. O. 4, 1916, 3.)

GUNNERS. *See also* MARINE CORPS RESERVE.

HAITI.

1. **Military commissions**—Conduct of military commissions and other exceptional military courts when held by military authority. (C. M. O. 13, 1916, 6.)
2. **Pay clerks**—On duty in Haiti, under provisions of act of June 12, 1916. (39 Stat. 223.) (C. M. O. 30, 1916, 8.)

HANDWRITING.

1. **Improperly introduced in evidence.**—The handwriting of a certain note was not proved before it was introduced into evidence. *Held*, improper. (C. M. O. 17, 1920, 1.)
2. **Proof of.** *See* EVIDENCE, DOCUMENTARY.

HARD LABOR.

1. *See* SENTENCE: CONFINEMENT.
2. **Sentence**—Hard labor adjudged in sentence means usual labor which all prisoners are expected to perform. (C. M. O. 78, 1917, 2.)

HEALTH AND COMFORT.

Clothing and small stores may be issued to persons in debt to the Government. *See* CLOTHING AND SMALL STORES.

HEARSAY EVIDENCE.

1. (C. M. O. 8 (10), 9 (10), 1921.)
2. **Statements against interest by third party**—"The court permitted the introduction of hearsay evidence over the objection of the judge advocate. The evidence objected to was a conversation the witness had had with a woman which the counsel for the accused claimed was admissible as it was a declaration against her interests. This contention was groundless. Greenleaf (16th edition, p. 232) states: 'Another exception to the hearsay rule admits the declaration of a *deceased* person stating a fact against the interest of the declarant. This class of statements embraces not only entries in books, but all other declarations or statements of facts, whether verbal or in writing, and whether they were made at the time of the fact declared, or at a subsequent day. But, to render them admissible, it must appear that the *declarant is deceased;* that he possessed competent knowledge of the facts, or that it was his duty to know them; and that the declarations were at variance with his interest.' From the foregoing, it appears that it is essential that it be shown that the declarant be dead. However, more modern authorities hold that such declarations are admis-

sible as evidence if there ' * * * be affirmative proof that it is the best attainable; in other words, that the testimony of the original declarant can not be procured because he is absent from the jurisdiction of the court, can not be compelled to testify, is dead, or is incapacitated, physically or mentally, from attendance' (16 Cyc. 1222). In this case, it had been shown that the original declarant was absent from the jurisdiction of the court. In the case of Harriman *v.* Brown (8 Leigh 697) the court held '* * * that the admissions of a person who could not be compelled to testify, and whose declarations are against his own interests, ought to be received as if he were dead.' But it still remains clearly to be shown that the declaration is against interest. In the case of Rand *v.* Dodge (17 N. H. 343) the court held that the declaration '* * * must have been, when made, to the knowledge of the declarant, against his obvious and real interest.' In this case, it appears that the declarant believed at the time she made the statements intruduced into evidence that she was talking to an official of the allotment office, and that instead of making a declaration against interest, she was in fact intending the contrary. Under these circumstances, the entire presumption that a declaration against interest is the truth, is necessarily vitiated, and the hearsay evidence is incompetent. The court should have sustained the objection of the judge advocate." (G. C. M. Rec. 47668; C. M. O. 87, 1920, 1.)

HEROISM.

1. **Advancement of officers**—For heroism. (C. M. O. 46, 1918, 8.)
2. **Clemency**—Accused recommended to the clemency of the revising authority because of "personal heroism during time of war." (C. M. O. 34, 1916.)

HISTORY.

Judicial notice. *See* JUDICIAL NOTICE.

"HIS OWN MISCONDUCT."

A refusal to undergo surgical operation may be so interpreted. *See* SURGICAL OPERATION.

"HIS OWN WRONG."

Take advantage of—Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong, and if the accused escapes from confinement, the trial may proceed without him. (C. M. O. 48, 1920, 11.)

HOMICIDE. *See* MURDER.

HOMICIDE BY MISADVENTURE.

Rather than manslaughter. (C. M. O. 243, 1919.)

HONORABLY ACQUIT. *See* ACQUITTAL.

HOSPITALS.

1. **Absence without leave of members of the naval personnel assigned to United States marine hospital.** *See* MARINE HOSPITAL SERVICE.
2. **Furloughed without pay**—Enlisted men furloughed without pay are entitled to treatment in naval hospitals. *See* FURLOUGH WITHOUT PAY.

HOSPITAL FUND.

Fleet Naval Reserve. (C. M. O. 41, 1916, 6-7.)

HOSPITAL SHIPS.

1. **Command of.** (C. M. O. 6, 1921, 11.)
2. **Deck courts**—Convening of. (C. M. O. 30, 1916, 6.)
3. **Punishments by commanding officer.** (C. M. O. 30, 1916, 6.)
4. **Summary courts-martial**—Convening of. (C. M. O. 30, 1916, 6.)

HOSPITAL TREATMENT.

Men on furlough without pay—The department has held that enlisted men on furlough without pay as provided for in the act of August 29, 1916 (29 Stat. 580-581), who desire hospital treatment, are entitled to make application to the commanding officer of a naval hospital, and, when such commanding officer is of the opinion that such applicants are in need of hospital treatment, the Surgeon General should, if practicable, authorize their admission. (7657-41102, Sec. Navy, Mar. 16, 1917; C. M. O. 22, 1917, 8.)

HOSTILITY.

Of member of court—Assigned as basis for new trial. (C. M. O. 275, 1919.) *See* NEW TRIAL.

HYPOTHETICAL QUESTIONS. *See* INSTRUCTIONS.

IDENTITY OF ACCUSED.
Essential in proving desertion. (C. M. O. 186, 1919, 25.)

ILLNESS.
As a defense to unauthorized absence from station and duty. *See* ABSENCE FROM STATION AND DUTY WITHOUT LEAVE. (C. M. O. 39, 1919, 17.)

IMMEDIATE SUPERIOR IN COMMAND.
1. **Defined.** (C. M. O. 8, 1921, 12.)
2. **Defined and discussed**—The term "Immediate superior in command," as used in the act of 29 August, 1916, is construed as meaning that officer present who, in the chain of command of the forces immediately present, is next above the officer ordering the summary court-martial. (C. M. O. 30, 1916, 7.)
3. **Effect of action by, on action of convening authority by whom sentence was mitigated.** (C. M. O. 12, 1921, 8.)
4. **Revision of summary court-martial.** *See* REVISION.

IMMORAL ACT.
Proper form of allegation. *See* CHARGES AND SPECIFICATIONS.

IMPOSSIBILITY.
As a defense to disobedience of orders. *See* DISOBEYING THE LAWFUL ORDER OF HIS SUPERIOR OFFICER.

INADEQUATE SENTENCES.
1. **Comments of the department**—An officer was convicted of making false and fraudulent reports, embezzlement, and scandalous conduct, and sentenced to lose twenty-five (25) numbers. The department stated: "It is with regret, surprise, and unqualified disapprobation that the department learned that officers of the experience and length of service of the members of the court which tried this case, regard one, who they have found guilty of making false and fraudulent official reports, of embezzlement, and of scandalous conduct tending to the destruction of good morals, as fit to continue to hold a commission, to serve and dwell among them on terms of equality, and to represent the authority of the Republic. (C. M. O. 41, 1917, 2.)
2. **Department refused to accept responsibility, and published that fact**—An officer was convicted of "Maltreating an inhabitant on shore," "Conduct to the prejudice of good order and discipline," and sentenced to lose 20 numbers in his grade. The convening authority because of the youth and inexperience of the accused, his good character, and with the hope that a mild punishment would be sufficiently corrective to cause him to control his temper and to treat others inferior as well as equal with justice, reduced the loss of numbers to five. The department expressed surprise that a court composed of officers of mature judgment should regard offenses of such seriousness as those in question as meriting a loss of but 20 numbers in grade, and at the action of the convening authority in reducing this already inadequate sentence to one which is but little more than nominal. "The department does not feel disposed to accept any measure of responsibility for the result which must necessarily ensue from such action and has therefore felt constrained to express its views as matter of record." (C. M. O. 35, 1917.)

INAPTITUDE FOR THE SERVICE. *See* OFFICERS.

INCOME TAX.
1. *See* TAX.
2. **Exemption of officers on the retired list of Navy.** (C. M. O. 4, 1921, 13.)

INCONSISTENCY.
Of evidence and statement, with the plea of guilty. *See* APPEAL.

INCONSISTENT PLEA. (C. M. O. 8, 1921, 12.)

INCRIMINATING QUESTIONS.
1. **Privilege personal.** (C. M. O. 8, 1921, 13.)
2. **Privilege of witness to refuse to answer**—Must be claimed by witness to each specific question. (C. M. O. 212, 1919, 5.)

INFERENCE.
Definition of—An inference is a deduction which the reason of the jury makes from the facts proved. (Words and Phrases Judicially Defined, vol. 4, p. 3579; C. M. O. 304, 1919, 15.)

IN JOINDER. *See* JOINDER, TRIAL IN.

INSANITY.

Insanity at time of trial—The accused having been found by the medical officers to be of unsound mind was not brought to trial for his offense. (File 2969–02, J. A. G., June 12, 1902; 20 J. A. G. 315.)

INTENT.

1. *See* DISOBEDIENCE OF ORDERS.
2. **What constitutes**—Intent being a state of mind is not subject to direct proof, but is a presumption of fact to be inferred from other facts. (Words and Phrases Judicially Defined, vol. 4, p. 3686; C. M. O. 304, 1919, 15.)

INSTRUCTIONS.

Strict adherence to—In a summary court-martial case in which a specification alleging theft was found proved the convening authority returned the record to the court for the purpose of changing its sentence to include the discharge of the accused from the service. The convening authority stated that this apparent violation of C. M. O. 309 was for the purpose of securing a decision from the department as to whether in such a case any sentence other than discharge from the service would be appropriate in view of the statement contained in Naval Digest, page 627, Theft, 1, to the effect that the best interests of the service demand that persons convicted of theft be discharged, and whether C. M. O. 309 should be followed in all cases regardless of circumstances.

The department expressed the view that while a strict adherence to the procedure directed in court-martial order 309, 1919, may, in rare cases, result in a miscarriage of justice or the retention of undesirables, yet the manifest advantages of such a course so far outweigh the occasional disadvantages as to make any violations of the spirit of the order very improper; that convening authorities have always the privilege of reporting such cases as they deem proper for action by the department; and that the department does not approve the creation of situations with a view to securing an opinion from the Judge Advocate General on abstract questions, especially when such action involves a violation of the published policy of the President. (File 26287–6572, Sec. Navy, 22 Apr., 1920; C. M. O. 74, 1920, 16.)

INTERESTS OF THE GOVERNMENT.

Judge advocate—As prosecutor should properly represent interests of the Government. (C. M. O. 17, 1917.)

INTERNATIONAL LAW.

1. **Desertion in foreign countries.** *See* DESERTER.
2. **General courts-martial**—Convened in foreign country. *See* FOREIGN COUNTRIES.
3. **Jurisdiction of state of origin over an alien enlisted in the United States military service.** (C. M. O. 3, 1921, 15.)
4. **Officers on shore in foreign countries.** *See* FOREIGN COUNTRIES; JURISDICTION.
5. **Rights and privileges of public vessels in territorial waters of a foreign state.** (C. M. O. 109, 1918; G. C. M. Rec. No. 39237.)
6. **Venice**—Officers of the U. S. S. *Chicago* arrested in Venice. *See* OFFICERS.

INTERPRETATION OF STATUTES.

1. **The expression of one thing is the exclusion of another**—A valuable rule frequently used by courts in interpreting statutes is that where certain classes of things are specifically included or specifically excepted in a statute, this is to be understood as meaning that the legislature did not intend to include or except any class of persons or things not specifically mentioned. The rule is known in law as *expressio unius est exclusio alterius*, which means that "the expression of one thing is the exclusion of another." (C. M. O. 34, 1918, 2.)
2. *See* STATUTORY CONSTRUCTION AND INTERPRETATION.

INTERROGATORIES. *See* DEPOSITIONS.

INTERVENING CAUSE. *See* LINE OF DUTY.

IN TIME OF WAR.

1. **Exactness of judgment**—The department returned a record to a court-martial for the purpose of reconsidering its finding of guilty and remarked "In time of war, when it often happens that speedy and decisive action is, or may be essential or imperative, the matter of exactness of judgment, when no material consequences are involved, does not appear to warrant a conviction of an officer of 'Conduct to the prejudice of good order and discipline.' " (C. M. O. 87, 1917, 2.)
2. **Naval personnel will not be delivered to civil authorities.** *See* CIVIL AUTHORITIES.

INTOXICATING LIQUOR.

1. **Not an offense to have in possession, except in prohibited places.** (C. M. O. 77, 1919, 16.)
2. **Possession of**—Having intoxicating liquor in possession on board ship as bases of charge of "Conduct to the prejudice of good order and discipline." (C. M. O. 141, 1919.)
3. **Sale of (during the World War)**—To officers and members of the Naval Reserve Force *released to inactive duty*, prohibited while such officers or men are in uniform. (C. M. O. 39, 1919, 20.)
4. **Sale of (during the World War)**—To persons *discharged from the naval service*, and while still wearing the uniform, does not, except in prohibited zones, appear to be unlawful. (C. M. O. 39, 1919, 20.)

INTOXICATION.

1. *See* DRUNKENNESS.
2. **Not voluntary**—Where accused took cough medicine in ignorance that it contained a narcotic which caused him to be intoxicated. (C. M. O. 181, 1919, 2.)

JEOPARDY, DOUBLE. *See* JEOPARDY, FORMER.

JEOPARDY, FORMER.

1. (C. M. O. 10, 1921, 11–20.)
2. **As applied to the military service**—"Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter. If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he can not again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States." (Grafton *v.* U. S., 206 U. S. 352.) (C. M. O. 48, 1920, 17.)
3. **"Fatally defective specification"**—Proceedings upon a "fatally defective specification do not constitute former jeopardy." (C. M. O. 22, 1916, 6.)
4. **Not prohibited in Navy by law**—An accused can not be placed twice in jeopardy for the same offense, such double jeopardy being prohibited by statute in the Army, though not in the Navy. But precedent and custom forbid it in the latter service. (C. M. O. 48, 1920, 12.)
5. **Plea in bar of trial.** (C. M. O. 5, 1921, 13.)
6. *See also* CONSTITUTIONAL RIGHTS OF ACCUSED.
7. **What constitutes**—John T. Murphy was recently tried for desertion. He entered a plea of former jeopardy and based same on the fact that he had been previously tried for the offense of desertion and acquitted. It appeared that the accused had been formerly tried under the name of John T. Murphy, but that the accused was not the John T. Murphy who committed said former offense, and that the desertion in the former case was from a different ship, at a different time and place from that for which he was now being tried. It was therefore held that the accused was not being tried for the same offense of desertion, and that there was no former jeopardy under the fifth amendment to the Constitution of the United States which provides against any person being twice put in jeopardy of life or limb for the same offense. (File 26251–16321, J. A. G., 8 May, 1918; G. C. M. Rec. No. 38077; C. M. O. 50, 1918, 17.)

JOINDER.

Trial in—When should not be had—The mere fact that several persons happen to have committed the same offense at the same time does not authorize their being joined in the charge. Thus where two or more persons in the naval service take occasion to desert or absent themselves without leave, in company but not in pursuance of a common unlawful design and concert, the case is not one of a single joint offense, but of several separate offenses of the same character, which are no less several in law though committed at the same moment. (File 26262–5714; G. C. M. Rec. No. 41658; C. M. O. 77, 1919, 18.)

JOINT RESOLUTION OF MARCH 3, 1921.

Previous legislation affected thereby. (C. M. O. 4, 1921, 14.)

JUDGE ADVOCATE.

1. **As counsel for accused**—A judge advocate stated to the court that, as the accused did not have counsel, the judge advocate was authorized by Navy Regulations to direct him how to present to the court in the most efficient manner the facts upon which the defense was based, and that in the case then being tried, the accused would admit the specification, as charged. "Though the judge advocate may act in an advisory capacity as counsel to the accused, rendering him, both in and out of court such assistance as may be compatible with his primary duty of conducting the prosecution, he can not act in a personal capacity as counsel * * *." (Naval Digest, 1916, p. 307, sec. 28.) There is no provision authorizing the judge advocate to assume the status of counsel for the accused; neither can he make admissions for the accused, and to that extent usurp the prerogative of counsel. (Naval Courts and Boards, 1917, sec. 255.) (File 26262-4360, J. A. G., 17 May, 1918; G. C. M. Rec. No. 38226; C. M. O. 50, 1918, 16.
2. **Censured**—The action of a judge advocate in not advising the court as to the law, particularly when counsel for the accused has placed an erroneous interpretation on it, is censurable. (C. M. O. 25, 1916, 2.)
3. **Counsel for the accused**—It is improper for the judge advocate, who is acting also as counsel for the accused, to introduce into evidence, matter clearly inadmissible. (File 26251-25761, 11 Nov., 1920; G. C. M. Rec. No. 50273; C. M. O. 133, 1920, 12.)
4. **Duty of**—When evidence tending to proof of corpus delicti has been admitted by court, to subject it to the usual tests of cross-examination. (C. M. O. 224, 1919.)
5. **Duty of**—When accused is without counsel, the judge advocate, being apprised of facts constituting a defense, should have advised him against pleading guilty. (File 26262-4880, G. C. M. Rec. No. 39584; C. M. O. 114, 1918, 27.)
6. **Effect of appointment of**—By other than convening authority. (C. M. O. 77, 1919, 16.)
7. **Improper conduct of, toward accused**—An accused was brought to trial upon a charge of desertion. The judge advocate, while on the stand as a witness, having failed to establish, by means of the service record, the absence of the accused, stated: "As a witness on the stand and under oath, I will state to the court that the accused, in conversation with myself previous to the trial, voluntarily stated to me that his name is ——— ———, apprentice seaman, U. S. Navy; that on or about August 26, 1919, he was stationed on board the U. S. S. ——— at ———, ———, and that he left the ship on or about that date. He also stated that he was delivered on board the said ship at ———, ———, on or about ———." The counsel for the accused then brought out in cross-examination the fact that the judge advocate had obtained all of these admissions from the accused before he had asked the accused if he desired counsel.

   From the above it appears that the judge advocate was laboring under a misconception, both as to his duties preliminary to trial and as to the admissibility of admissions or confessions. (*See* Naval Courts and Boards, 1917, sec. 253; Naval Digest, 1916, p. 312, sec. 119, p. 307, sec. 36.) (File 26251-22522, Feb. 5, 1920; G. C. M. Rec. No. 48554; C. M. O. 48, 1920, 30.)
8. **Precept**—Document relieving one judge advocate and appointing another, is modification of precept but does not authorize erasure or substitution in original document. (C. M. O. 82, 1917, 3.)
9. **Presence in closed court**—Prohibited. (File 26251-12618, Dec., 1916, pp. 10–11 of G. C. M. Rec. 32985.)
10. **Prosecutor**—Judge advocate as prosecutor should properly represent the interests of the Government. (C. M. O. 17, 1917.)
11. **Rebuked by court**—The duties of the judge advocate during the trial and his relations to the court, are set forth in Naval Courts and Boards, 1917, page 190, section 254; for the proper discharge of such duties he is responsible to the convening authority. (N. C. B., 1917, sec. 250.) In view of the foregoing, the court erred in administering a rebuke to the judge advocate, being wholly without power to do so. (File 16870-47; 279, J. A. G., 4 Aug., 1919; C. M. O. 237, 1919, 14.)
12. **Record of proceedings**—Responsibility for errors in. (C. M. O. 10; 38; 1916.)
13. **Relief**—Judge advocate can be relieved only by lawful order of convening authority. (C. M. O. 88, 1917, 14.)
14. **Should exercise care in regard to authenticity of statements.** (C. M. O. 321. 1919, 12.)
15. **Sould not join in recommendation to clemency.** *See* CLEMENCY.

JUDGE ADVOCATE GENERAL.

1. **Court-martial orders**—The term "Judge Advocate General" when used in court-martial orders refers to the Judge Advocate General of the Navy. Should any other officer be meant, the department or branch in which he holds such office will be stated. (C. M. O. 41, 1916, 6.)
2. **Opinions**—The Judge Advocate General renders "opinions" not "decisions." (C. M. O. 37, 1916, 6.)
3. **Retired officer**—A retired officer of the Navy or Marine Corps may be detailed as Judge Advocate General. (20 J. A. G. 359, June 21, 1902.)
4. **Statutes relating to the personnel**—The interpretation of statutes relating to the personnel of the Navy and Marine Corps is part of the work of the office of the Judge Advocate General. (An. Rep. J. A. G., 1916, p. 17.)

JUDICIAL NOTICE.

1. *See* File 26251-12159, p. 21; N. C. B., 1917, p. 110.
2. **"Official duty"**—The court should take judicial notice of the fact that it is the official duty of officers of the Navy to take all practicable steps for the apprehension of deserters. (C. M. O. 27, 1913, 15.)

JUDICIAL QUESTIONS.

Department will not enter into merits of—In a case involving the payment of an insurance policy on the life of an enlisted man in the Navy, inquiry was directed to the department as to the liability of the company; the Judge Advocate General expressed the following views thereon:

"The question presented is a judicial one which this department is not authorized to answer." (20 Op. Atty. Gen. 383, 673; 19 Op. Atty. Gen. 56; 29 Op. Atty. Gen. 226; 24 Op. Atty. Gen. 59; 23 Op. Atty. Gen., 221, etc.)

As pointed out by the Attorney General in the opinions cited and numerous others to the same effect, there are many reasons why the executive branch of the Government should not undertake to decide questions pending in court or which can only be judicially determined. Thus such executive opinion would not bind the court in any way; the executive might be brought into conflict with a judicial tribunal; an opinion so rendered by the executive would have no more weight than the opinion of any unofficial person; to give an opinion in a matter where the subject involved is disputable and is the subject of a pending suit would be equivalent to expressing an opinion as to whether the question ought to be decided in favor of one of the parties; and it is inexpedient, improper, and unwarranted for the executive to render opinions in such cases, etc. (File 26806-166, J. A. G., 8 Oct., 1919; C. M. O. 296, 1919, 12.)

JURISDICTION.

1. **An enlisted man whose enlistment has expired, can not be tried for desertion in time of war**—Private George H. Runyan, U. S. Marine Corps, was found guilty of desertion, the specification of the charge alleging that he "did, * * * desert * * * and did remain a deserter until the expiration of his enlistment * * *, the United States then being in a state of war." The Attorney General has held that an enlistment expires with the last day of the term and that with the expiration of the enlistment the obligation to serve, thereby imposed, is at an end and that this results, notwithstanding that there has been an infraction of the contract by desertion or otherwise; unless the soldier before the term is up consents to an extension. (15 Op. Atty. Gen. 152.) The jurisdiction of a naval court-martial is by the Articles for the Government of the Navy confined to persons in the naval service except for offenses set forth in article 14, Articles for the Government of the Navy, and for the offense of desertion in time of peace as set forth in article 62. The latter extends the jurisdiction of a naval court-martial but as this is criminal jurisdiction, by the well-known principle of statutory interpretation it must be strictly construed and held to apply to desertion in time of peace only. It cannot be construed to apply to desertion in time of war. Desertion in time of peace and desertion in time of war are distinctly separate offenses, one being provided for in article 8 of the Articles for the Government of the Navy, the other in article 4. (File 26251-26615, 20 December, 1920; G. C. M. Rec. No. 51150; C. M. O. 151, 1920, 13.) *But see* C. M. O. 4, 1922.
2. **Appeal because of lack of.** *See* APPEAL.
3. **Army courts-martial**—To try marines detached for duty with Army for violations of Articles of War. A marine was under charges for trial by Army court-martial for offenses alleged to have been committed by him while an inmate of an Army hospital in Baltimore. It appears that the marine in question, having been wounded at the Argonne, was, upon his return to the United States, admitted to the naval hospital

at Norfolk, Va., from which he was later sent to an Army hospital in Baltimore, Md. A request that he be transferred to the naval hospital, Washington, was not complied with by the Army authorities, the reason given being that charges were pending against him. On the foregoing statement of facts, and after a review of the laws pertinent thereto, the Judge Advocate General was of the opinion that inasmuch as the aforementioned marine was detached for duty with the Army, and it not appearing that he has ever been returned to the jurisdiction of the Navy, it follows that, under the provisions of section 1621 of the Revised Statutes, an Army general court-martial has jurisdiction to bring him to trial for violation of the Articles of War. (File 27228–547 J. A. G., 23 May, 1919. C. M. O. 186, 1919, 36–37.)

4. **Army courts-martial**—To try persons in the Navy. (C. M. O. 77, 1919, 17.)
5. **Charleston, S. C., naval station.** (File 131,03; 22 J. A. G. 135.)
6. **Civilians may be subject to jurisdiction of a court-martial.** *see* CIVILIANS.
7. **Concurrent jurisdiction**—Civil and military exists where an accused has libeled his superior officer, i. e., he may be tried in the civil courts for criminal libel in addition to his offense against discipline for which he was brought to trial by court-martial. The jurisdiction of the State and naval authorities over the offense being concurrent and conviction by the one could not oust jurisdiction of the other. (File 26251–12159, Dec. 9, 1916, p. 22.)
8. **Concurrent**—State and naval courts-martial. (File 26251–12159, p. 22.)
9. **Courts**—Court, on motion of accused, ruled that it was without jurisdiction to try him upon the charge and specification preferred, although later, without revoking this ruling, it proceeded with the trial, found the accused guilty, and sentenced him. (C. M.O. 89, 1919.)
10. **Court**—Objections to, by counsel for accused on ground of incriminating testimony given under compulsion. (C. M. O. 212, 1919, 4.)
11. **Courts**—Of persons in the naval service regardless of title under which charged. (C. M. O. 12, 1919.) *See* ACCUSED.
12. **Courts-martial**—Civil courts have no jurisdiction over such offenses as falsehood, etc.; over such offenses naval courts have exclusive jurisdiction. (File 26251–12159, p. 18.)
13. **Courts-martial**—Under the Navy Regulations and the Articles for the Government of the Navy, all persons in the naval service are subject to discipline and trial by court-martial for any offense committed by them which is a violation of any Federal law or of the law of a State within which the offense was committed. (File 3980–1429 J. A. G., 30 Mar. 1918: C. M. O. 30, 1918, 28.)
14. **Of court-martial**—Effect of discharge upon status of enlisted man committing subsequent offense and reenlisting. A question was presented as to whether an enlisted man in the Navy is amenable to trial by court-martial for an offense on the day of, but subsequent to the delivery of, his discharge, he having reenlisted the following day. If the man was discharged for any cause other than expiration of enlistment, he was not in the naval service subsequent to his discharge and when his offense was committed, and therefore could not be tried, notwithstanding his subsequent reenlistment.

    If, however, he was discharged by reason of expiration of his enlistment he was in the naval service when his offense was committed, his discharge not having become effective until midnight of that day. If the offense is discovered and the accused is placed under arrest to await action before his discharge takes effect, the general rule is that when jurisdiction has thus attached the same is not divested by any subsequent change in the status of the accused. (File 26504–298, J. A. G., 26 Feb. 1917, C. M. O. 22, 1917, 7–8.)
15. **Courts-martial**—Naval courts-martial being courts of special and limited jurisdiction have no power to proceed except in cases where they are specially empowered by statute. As stated by Judge Sanborn in the Circuit Court of Appeals for the Eighth Circuit in the case of Deming *v.* McClaughry (113 Fed. Cas. 639):

    "The legal presumption is that courts of general jurisdiction have the power and the authority to make the adjudication which they render, and that their judgments are valid. But no such presumption accompanies the sentences of courts of inferior or limited jurisdiction. It is indispensable to the maintenance of their judgments that their jurisdiction shall be clearly and unequivocally shown. A court-martial is a court of limited jurisdiction. It is a creature of the statute, a temporary judicial body authorized to exist by acts of Congress under specified circumstances for a specific purpose. It has no power or jurisdiction which the statutes do not confer upon it." (C. M. O. 60, 1920, 23.)

16. **Courts-martial**—Over offenses against the civil laws of the State by members of the naval service.

The essential features, in addition to being legally constituted, to give a general court-martial jurisdiction are, (*a*) that an accused shall belong to an organization whose members are subject to trial by a naval court-martial, and (*b*) that the offense alleged against him must be one recognized by either the laws regulating civil society or the laws for the government of military forces. (Ex parte Mason, 105 U. S. 700; Smith *v.* Whitney, 116 U. S. 183; Ex parte Milligan, 4 Wall. 123; 6 Op. Atty. Gen. 415; G. C. M. Rec. 31819; C. M. O. 9, 1916, 6.)

17. **Courts convened by marine officers embarked as separate organization.** *See* MARINE OFFICERS.

18. **Discharged enlisted men**—An enlisted man having been discharged, a naval court martial has no jurisdiction over his person except for offenses committed in violation of article 14 of the Articles for the Government of the Navy, and except for desertion in time of peace, as provided in article 62 of the Articles for the Government of the Navy. (File 26251-25789, 3 Dec., 1920, G. M. C. Rec. No.50679; C. M.O.151, 1920, 10-11.)

19. **Enlistment expired**—An accused whose enlistment expires during time he is being held for trial by court-martial, but who has not been given a discharge, is subject to the jurisdiction of a naval court-martial upon the charges for which he is being so held. But he is no longer in the Navy. (C. M. O. 39, 1919, 17.)

20. **General court-martial has**—Even though the enlistment of the accused has expired. (C. M. O. 39, 1919, 17.)

21. If, near the completion of his enlistment, a man is desired to be held for trial by court martial for an offense, affirmative steps to that end must be taken before the expiration of his enlistment. (C. M. O. 1, 1921, 15.)

22. **Land within the United States.** *See* LAND.

23. **Naval authorities**—Have jurisdiction over all offenses defined in General Order No. 410, dated 2 August, 1918, committed by persons in the naval service while on active duty, or, if on inactive duty, while wearing the uniform of their respective ranks, grades, or ratings. Persons discharged from the naval service are, of course, not amenable to naval jurisdiction for alleged offenses under the above general order. (C. M. O. 39, 1919, 20-21.)

24. **Naval reservist recalled to active duty**—An accused was recalled to active duty in violation of law. Immediately upon reporting he was placed under arrest and held for trial by naval general court-martial. By such arrest the court obtained jurisdiction over his person, and, having such jurisdiction, it was authorized to proceed to try and punish him for the offenses against naval justice committed within two years prior to his arrest. (In re Bird, 3 Fed. Cas. 1438; Walker *v.* Morris, 3 Am. Jur. 281; Case of Lord George Sackville, as reported in Tytler's Military Law, p. 113.) (File 26251-21558, J. A. G., 26 Feb., 1920, G. C. M. Rec. No. 45913; C. M. O. 48, 1920, 27.)

25. **No authority requiring members to be officers on active list of Navy or Marine Corps**—Article 39 of the Articles for the Government of the Navy does not provide, nor is it provided anywhere in the laws or regulations for the government of the naval service, that the members of naval general courts-martial must be commissioned officers on active duty. Under the practice of the department retired officers not on active duty are never employed as members of naval court-martial. Nevertheless, a precept signed by the Secretary of the Navy convening a court and designating certain retired commissioned officers as members thereof is in itself sufficient order to active duty, for membership on naval courts-martial is active duty. And though additional orders are in practice issued by the Bureau of Navigation and Marine Corps Headquarters, such orders are not necessary to the jurisdiction of the court. It has heretofore been held that the precept is all that is necessary to authorize the officers to act as members of a court. (C. M. O. 28, 1910; 33, 1912; 155, 1897; 74, 1899, 103, 1899; 26, 1910; C. M. O. 48, 1920, 24.)

26. **Of court-martial, as to offenses committed after expiration of enlistment**—The enlistment of an accused expired September 20, 1918, and the offense for which he was brought to trial was committed 8 October, 1918, on which date he was without the jurisdiction of a naval court-martial, the department directed that the proceedings, finding and sentence be set aside as illegal. (*See* U. S. *v.* Travers, 28 Fed. Cas. No. 16537.) (File 26251-18353, G. C. M. Rec. No. 41706; C. M. O. 190, 1918, 25.)

27. **Of courts-martial can be sustained in collateral proceedings.** (C. M. O. 12, 1921, 10.)

28. **Of naval general court-martial**—To try persons no longer in service for offenses committed prior to discharge. (C. M. O. 237; 296; 1919.)

29. **Of offenses committed by naval personnel while acting in a civil capacity**—A sergeant of marines, detailed as chief of police of Guam, was charged with violating the civil laws of Guam. On appearing before the court-martial he pleaded its lack of jurisdiction, in that the offenses alleged against him were not military but were founded upon violation of the civil laws of Guam and while acting in a civil capacity. *Held*, That the essential features, in addition to being legally constituted, to give a general court-martial jurisdiction in a case similar to the one under consideration, are (*a*) that an accused shall belong to an organization whose members are subject to trial by a naval court-martial, (*b*) that the offense alleged against him must be one recognized by either the laws regulating civil society or the laws of the government of military forces. (Ex parte Mason, 105 U. S. 700; Smith *v.* Whitney, 116 U. S. 183; Ex parte Milligan, 4 Wall. 123; 6 Op. Atty. Gen. 415.) (G. C. M. Rec. No. 31819; C. M. O. 9, 1916, 5.)
30. **Offenses against civil laws.** (C. M. O. 9, 1916, 5–6.)
31. **Officers ashore in a foreign state**—Naval officers on shore in a foreign country have been held amenable to the local laws. (File 3844–02, J. A. G., May 1, 1902; 20 J. A. G. 146.)
32. **Over offenses committed in a prior enlistment.** (C. M. O. 12, 1921, 11.)
33. **Parole**—The accused at the time of his apprehension for desertion, though on parole, was virtually in the hands of the civil authorities, and the department, therefore, directed his discharge from the service as undesirable. (File 4365–02; 20 J. A. G. 240.)
34. **Power to convene general courts-martial**—Only the Secretary of the Navy can empower commanding officers of squadrons, divisions, or flotillas to convene general courts-martial. (File 26262–8079, 22 Dec., 1920; G. C. M. Rec. No. 51057; C. M. O. 151, 1920, 14.)
35. **Power to convene general courts-martial**—Those who are authorized to convene general courts-martial are enumerated in article 38, Articles for the Government of the Navy, but the act of August 29, 1916, provided that certain others may convene general courts-martial when so empowered by the Secretary of the Navy. In every case, however, the record must affirmatively show this authority. Failure in this regard vitiates the proceedings. (See Naval Courts and Boards, 1917, secs. 21 and 22.) (File 26262–7871, 13 Oct., 1920; G. C. M. Rec. No. 50102; C. M. O. 127, 1920, 12.)
36. **Punishment of enlisted men on detached duty.** *See* ENLISTED MEN.
37. **Record must affirmatively show the court's jurisdiction**—The petitioner in a writ of habeas corpus contended, *inter alia*, that the Army court-martial which tried and sentenced him was composed entirely of retired officers who were disqualified to sit in judgment on his case, that a court-martial being a court of special and limited jurisdiction, the record of proceedings of such tribunal must disclose on its face that the court was legally constituted as provided by law and empowered to try the case and render judgment and impose sentence thereon. The court in sustaining the petitioner's demurrer to the response to the petition, held that, inasmuch as the record made at the trial did not on its face disclose that the members of the court were at the time it was convened "employed in active duty at the discretion of the President" under the act of June 3, 1916, or otherwise qualified to sit on a general court-martial, it followed, on the face of the record made, that the court was not constituted as by law provided, unless said record may be supplemented by evidence *aliunde* to show the fact, if it be a fact, that the members of the court, although retired officers, were at the time in the discretion of the President in active duty. The Government insisted that evidence *aliunde* could be produced to show this fact. The petitioner denied this contention, and the court sustained the contention of the petitioner (In re petition of David A. Henkes, District Court of United States for the District of Kansas, Nov. 28, 1919). (C. M. O. 48, 1920.) Upon appeal by the Government to the United States Circuit Court of Appeals, Eighth Circuit, the decision of the District Court was on May 14, 1921, overruled. The court stating, inter alia: "Moreover, although it was necessary that each member of the court be fully competent to sit, nevertheless, we are of opinion that Order No. 304 (precept), convening the court and appointing the detail and the resulting service and action taken by those detailed, raised the presumption that its members were competent and possesses all the necessary qualifications entitling them to sit as such, and that the burden rested on the petitioner to overthrow that presumption." (McRae *v.* Henkes, U. S. Circuit Ct., 8th Circuit, No. 5556, May term 1921. Case not yet reported.) (C. M. O. 8, 1921.)
38. **Retired officers**—Naval courts-martial have jurisdiction over retired officers of the Navy and Marine Corps. (C. M. O. 34, 1916.)

39. **Review by naval authorities of proceedings of the Army in re marines serving** with the Army. *See* MARINES.
40. **State of origin over an alien enlisted in the military service of the United States.** (C. M. O. 3, 1921, 15.)
41. **Summary court-martial**—Where an enlisted man was tried by summary court-martial, it appears that the specification was preferred by the commanding officer of the vessel to which the accused was attached, but the specification was referred to a summary court-martial convened by authority of an officer other than the commanding officer of the accused or his successor, namely, by the "Commander Destroyer Division 30." In approving the acquittal of the accused in this case the Judge Advocate General held that ordering the court to convene, preferring the specification, and referring the same to a particular court for trial, are the acts necessary to order a summary court-martial upon an accused, and that article 26 of the Articles for the Government of the Navy contemplates that all these acts be performed by the same commanding officer or his successor in office. A summary court-martial convened by the commanding officer of one vessel would therefore be without jurisdiction to try a case where the specification is preferred by the commanding officer of another vessel. (File 26237-6537, Sec. Nav., 5 Apr., 192); C. M. O. 74, 1920, 15.)
42. **To punish persons in the Naval Reserve Force for offenses committed while not actually engaged on active duty with the Navy**—The Navy Department is without jurisdiction to try or otherwise punish persons enrolled in the Naval Reserve who are not ordered to active duty with the Navy.

    The jurisdiction of the Navy Department to try by court-martial or otherwise punish persons enrolled in the Naval Reserve Force, and ordered to report for active duty, but who had not actually reported for active duty at the time of the commission of the offense, for offenses committed against the laws, regulations, and orders for the government of the naval service attaches when no travel is involved, on the date specified in their orders as the date on which they are required to submit themselves to naval jurisdiction; and this is true whether they report or not.

    The question of jurisdiction in the case of members of the Naval Reserve Force who commit offenses while on active duty with the Navy and who are relieved from active duty with the Navy before the offense became known to the naval authorities, had been submitted to the Attorney General for his opinion.

    The foregoing does not refer to transferred members of the Fleet Naval Reserve, as such persons are at all times subject to the laws and regulations for the government of the Navy. (File 26251-16994:14, J. A. G., June, 1919. *See also* File 4032-207, J. A. G., 20 June, 1919; C. M. O. 209, 1919.)
43. **When place is essential to establish**—It must be alleged in the specification. (C. M. O. 3, 1921, 13; C. M. O. 10, 1921, 11.)

JUSTIFIABLE CAUSE.

1. **As affecting charge of assault**—"An assault means an unlawful act, so if one strikes in self-defense he has committed no assault. 'A person who is unlawfully attacked by another in such a manner as to incite in him a reasonable belief that he is in danger of losing his life, or receiving some great bodily injury, may use such force to repel the attack as at the time appears to him to be reasonably necessary.' (Barr *v.* State, 45 Nebraska 458; 63 N. W. 856.) So, in this case, it appears that the accused under the immediate stress of the circumstances and facing a situation which he considered required immediate action resorted to the only means which he considered adequate to withstand the impending assault and used a stick which was at hand. 'To authorize a person to use a weapon in self-defense it is sufficient to show a reasonable ground for apprehending a design to take his life or to do him some great bodily harm, and that the danger was imminent that such design would be accomplished, although it might afterwards turn out that such appearances were false and there was not, in fact, any such design or any danger that it would be accomplished.' (Evers *v.* People, 3 Hun, 716, N. Y., 1875.)" (File 26262-7266, J. A. G., Mar. 6, 1920, G. C. M. Rec. No. 46857; C. M. O. 60, 1920, 17.)
2. **Libelous communications between naval officers**—The circumstances must be very exceptional for there ever to be justifiable cause for the publication, by naval officers, of libelous matter concerning a brother officer. (C. M. O. 5, 1917, 10.)

3. **Libelous letter by a naval officer to his father concerning a brother officer**—An officer was charged with libeling his superior officer, the letter in question having been written to the father of the accused. It was contended that there was justifiable cause.

The law recognizes certain conditions under which persons may, in the exercise of a legal or moral duty, express in writing an unfavorable opinion of others without being held answerable therefor. Such for example, would be the case of a business man asked for his views of a former subordinate by a prospective employer of the latter; or the case of a relative or friend who has been consulted by a father concerning his daughter's suitor; or one who reports to the authorities well-founded suspicions concerning the criminality of a public officer. But even in such cases the law surrounds the exercise of this privilege with strict limitations so that one who assumes to avail himself thereof must move with extreme caution and circumspection or else proceed at his peril. "Thus a letter written to a woman containing libelous matter concerning her suitor is not justified by the fact that the writer was her friend and former pastor and that the letter was written at the request of her father, who assented to all its contents." (25 Cyc. 395.)

Held, That the letter in the present case is not one coming within any of the exceptions mentioned. There was therefore no justifiable cause. (C. M. O. 5, 1917, 10.)

JUSTICE.

Three cases identical—Two acquittals, one conviction—"Two other officers were tried on the same charge as the accused in this case, the specification in each case alleging the same facts, and arising from the same incident. The two other officers were tried subsequent to this case, each before different courts, and both were acquitted. In all three cases the prosecution had the same two witnesses, and their testimony was as nearly identical in each case as could well be possible. The defense in this case had nine witnesses, of whom, with the exception of the accused, only one was not called in one or both of the other cases. In each of the cases an alleged confession by the respective accused was introduced in evidence. The evidence of the defense in each of the three cases was, in all material respects, identical. The evidence in each of these cases was conflicting, and, in the opinion of the Judge Advocate General, might well sustain either a conviction or an acquittal. Therefore, one court might very well conscientiously convict, while another court might acquit the accused upon the evidence adduced in this case." The proceedings were approved, but the findings (guilty) and sentence were disapproved in the interests of justice. (G. C. M. Rec. 48508; C. M. O. 102, 1920.)

LAND.

1. **Political jurisdiction may not be surrendered**—No private person has the power to surrender to the United States or to any other nation or person by lease of lands any part of the political jurisdiction of the State in which the lands are located. Exclusive jurisdiction can be obtained by the United States only by purchase of the land for purposes enumerated in the Constitution of the United States. "By consent of the legislature of the State in which the same may be" (U. S. *v.* Tierney, Fed. Cas. No. 16517), or by express cession of the State. (File 28787-6, J. A. G., July 17, 1917; C. M. O. 46, 1917, 21.)

LARCENY.

1. **As to what may constitute possession.** *See* POSSESSION.
2. **Conviction can not be predicated on admissions of counsel.** *See* ADMISSIONS.
3. *See also* THEFT, EMBEZZLEMENT.

LAW.

1. In accordance with article 51, Articles for the Government of the Navy, members of a court-martial are bound by law to adjudge adequate sentences for offenses committed in a particular case. (C. M. O. 10, 1916, 2.)
2. **Questions of.** *See* QUESTIONS OF LAW.
3. **State or Federal**—Court-martial has jurisdiction to punish Naval personnel for violations of. *See* JURISDICTION.

LAWFUL ORDERS.

1. **"A soldier is bound to obey only the lawful orders of his superiors.** If he receives an order to do an unlawful act, he is bound neither by his duty nor his oath to do it. So far from such an order being a justification, it makes the party giving the order an accomplice in the crime." (U. S. *v.* Carr, 25 Fed. Cas, 307.) (C. M. O. 212, 1919, 5.)

LEAVE.
1. **Nurses.** *See* NAVY REGULATIONS.
2. **Navy Nurse Corps.** (C. M. O. 7, 1921, 16.)

LEAVE OF ABSENCE.
1. **Employees**—Of navy yards, gun factories, naval stations and arsenals. (File 26254–2098; 1.)
2. **Members of courts-martial.** *See* MEMBERS OF COURTS-MARTIAL.
3. **Member of general court-martial**—May not absent himself from said court upon leave granted by his immediate commanding officer. A member or judge advocate is relieved as such only by lawful order of the convening authority. (C. M. O. 88, 1917, 14.)

LEAVING POST BEFORE BEING REGULARLY RELIEVED.
1. **"Failing to return to his post and duty as ordered" is not included in, nor is it a charge of less degree than.** (File 26262-4342, G. C. M. Rec. No. 38130; C. M. O. 71, 1918.)

LEGAL ASSISTANCE.
1. **Department affords only in cases arising in performance of official duties**—A request was recently made upon this department that steps be taken to insure proper defense in the case of a marine about to be put upon trial, before the criminal courts of a State, on the charge of rape. *Held*, In a proper case the department takes action through the Department of Justice to protect persons in the naval service from the consequences which may ensue from the performance by them of official duties. But where, as in this case, the offense is not one resulting from the performance of official duties, the department must decline to take steps to afford legal assistance at the expense of the United States. (File 26254–780, Sec. Nav., 17 July, 1919: C. M. O. 237, 1919, 23.)
2. **For officers and enlisted men.** (*See* File 4625–02; 20 J. A. G. 251.)

LESS DEGREE THAN CHARGED.
1. **"Wherever a lesser offense is found,** the findings upon the specification and the charge should be so framed as to be consistent, and the findings on the specification should be such as to support the findings on the charge. With this in view, there should properly be excepted from the specification such words as in law characterize only the superior offense, * * * and in so excepting, the court should further substitute * * * other words properly descriptive of the real offense." (Winthrop's Military Law and Precedents, p. 582; C. M. O. 316, 1919.)

LESSER INCLUDED OFFENSE.
1. **Absence from station and duty without leave is not a lesser included offense of "breaking arrest."** (C. M. O. 3, 1921, 13.)

LETTERS.
1. **Defamatory letter.** (File 26251–12159, Sec. Navy, Dec. 9, 1916, p. 13.)
2. **Libelous.** (File 26251–12159, Sec. Nav., Dec. 9, 1916, p. 13.)
3. **Of third parties, admissibility of, in evidence.** *See* EVIDENCE, DOCUMENTARY.

LETTERS OF REPRIMAND.
1. **May be placed on fitness report by reporting senior**—It has been held that a senior reporting officer may place a letter of admonition or reprimand written by said senior to a subordinate officer upon whom the senior reports, on the fitness report of said subordinate officer. When such a letter is placed on said report, the report must be referred to the subordinate in accordance with I–707 (8) in order that the subordinate may make a statement in regard to said unfavorable matter, thus putting the department in a position to judge the case upon its merits and, should such action be deemed warranted, to express its disapproval of the action of the reporting senior, the record of the junior officer concerned showing such disapproval. (File 28612–2, J. A. G., 9 Feb., 1918; C. M. O. 15, 1918, 19.)

LIBEL.
1. **Gravamen of offense**—The acts of writing and addressing a communication containing libelous matter do not constitute any crime or misdemeanor at common law; the gravamen of the offense is the publishing of such communication. (C. M. O. 39, 1919, 18.)

2. **What constitutes publication—How liability is determined**—An accused charged with libeling his superior officer admitted authorship of the letter, but it was contended that he was not responsible for its publication, the letter having been written to his father who communicated it to the counsel for the accused who in turn communicated it to the department. "It is commonly said that a libel must be 'published' to constitute a wrong, but a communication of the defamatory matter to the mind of another—even privately to the party injured, and not to a third person—is a publication thereof, rendering the offender subject to trial under penal statutes (State *v.* Shaffner, 44 Atl. 620, 621; Swindle *v.* State, 10 Tenn. 581, 582); and it has even been held that the writing of a letter and depositing it in the post office for transportation to the party addressed, constitutes a publication of it within the law of criminal libel (Mankins *v.* State, 41 Tex. Cr. R. 662), though the contents should not in fact become known (Haase *v.* State, 53 N. J. Law 34). On the other hand, under the law of civil libel it is necessary merely that the matter should be communicated to some person other than the parties to the action, and the dictation of a libelous letter to a stenographer is held a sufficient publication thereof (Gambrill *v.* Schooley, 95 Md. 48, and cases there cited)." (File 26251-2993, Mar. 10, 1910.)

In 25 Cyc. 570, it is stated on this point: "Giving a letter containing defamatory matter to a clerk to copy or sending it to an attorney for the prosecution is a publication. So a communication of the defamatory matter to the person defamed alone is a sufficient publication; the basis of the rule being the tendency of a criminal libel to produce a breach of the peace." "If a person composes a libel and sends it to his agent, to be read by him, and it reaches its destination and is read by such agent, it is sufficient publication to support action." (25 Cyc. 369.) *Held*, That the accused published the latter in question. It is certain that he published it to the addressee, and whether or not the further publication was in accordance with his desire the fact can not be escaped that he started it on its way and therefore places himself at the mercy of those who might receive it. (C. M. O. 5, 1917, 8.)

LIGHTHOUSE VESSELS.

1. **Status of members of the crew while serving under the Navy Department**—Members of the crew of a lighthouse vessel of the United States serving under the Navy Department in accordance with the act of August 29, 1916 (29 Stat. 557, 602), who are killed or wounded by gunfire or other casualty would be considered as members of the naval service for the time being, and would be entitled to receive hospital treatment. If the result of their wounds should carry with it physical disability, they would be entitled to pension. In cases of death, under such circumstances, the widows and children under 16 years of age would be entitled to pensions under the act of August 7, 1882 (22 Stat. 345). In the event of capture by a public enemy of the United States members of the crew of a lighthouse vessel serving as above indicated would be of the status of prisoners of war. (File 7014-321: 3, Sec. Navy, Mar. 6, 1917; C. M. O. 22, 1917, 9.)

LIMITATIONS OF PUNISHMENT.

1. **Article 60, A. G. N., does not apply where accused waives his right to be confronted by the witnesses against him.** (C. M. O. 157, 1919, 2.)
2. **Perjury during war.** *See* PERJURY.
3. **In time of war**—The limitation of punishments prescribed by the President being suspended, the use of unauthorized charges does not involve the same fatal consequences as would be the case in time of peace. (C. M. O. 73, 1919.)

LINE OF DUTY.

1. **Construed**—The following cases have been held to be line of duty and not due to misconduct:

Drowning—Deceased, a member of an organized funeral party returning to station, jumped from a cutter which had collided with a tug. While evidence showed that jumping from the cutter was an error of judgment on the part of the deceased, still such error did not extend to culpability. (File 26835-553, Sec. Navy, Apr. 12, 1916.)

Same—Deceased, late auxiliary officer, while on board the *Solace*, disappeared. Several days later his body was found and disclosed that he had met death by drowning. No evidence of self-destruction or suicidal intent. (File 26250-774, Sec. Navy, Apr. 27, 1916.)

Same—Deceased, while acting as stern man on a cutter, fell overboard as a result of a fainting spell. Autopsy revealed weak heart. (File 26250-779, Sec. Navy, Apr. 20, 1916.)

Drowning—Deceased, member of a cutter's crew at a training station, attempted to turn boat in breaking sea. Error of judgment on part of coxswain who was drowned with other members of crew. (File 26250–763, Sec. Navy, Apr. 1, 1916.)

Heart failure—Deceased, while seated in band room, his regular station, dropped dead. Although there was evidence to show that during the preceding 24 hours the deceased had slightly indulged in the use of intoxicating liquor, an autopsy revealed that death was due to acute dilation of the heart resulting from pneumonia contracted in line of duty. (File 26250–780, Sec. Navy, Apr. 14, 1916.)

Strangulation—Deceased, while engaged in duty on board ship, fell into a drum room in such a position that he was unable to release himself. As a result and in the absence of timely aid the accused was strangled to death. Evidence showed falling to be accidental. (File 26250–778, Sec. Navy, Apr. 21, 1916.)

The following case has been held to be *not* line of duty but *not* due to misconduct:

Concussion of brain—Deceased, while on authorized liberty and riding a motor cycle for his own pleasure, was thrown therefrom and sustained injuries which resulted in death. There was no evidence of negligence on the part of the deceased. (File 26250–783, Sec. Navy, Apr. 20, 1916.)

The following case has been held to be *not* line of duty and *due* to misconduct:

Drowning—Deceased, returning from unauthorized absence intoxicated, attempted to go aboard ship over unauthorized gangway, fell overboard and was drowned. (File 26250–758, Sec. Navy, Apr. 19, 1916.) (C. M. O. 13, 1916, 7.)

2. **Same**—*Drowning*—Deceased fell overboard from a shore boat while returning to his ship from authorized liberty. Deceased was sober at the time and his death was found due to accidental drowning. *Held,* Not line of duty and not misconduct. (File 26250–789, Sec. Navy, May 5, 1916.)

Same—Deceased, an acting ship's cook, went to ship's side to dump eggshells, fell overboard and was drowned. Evidence showed that life line had been left down. *Held,* Line of duty and not misconduct. (File 26250–796, Sec. Navy, May 26, 1916.)

Struck by train—Deceased was struck by train while a trespasser on railroad tracks in violation of definite law and signboards. *Held,* Not line of duty and misconduct. (File 26250–788, 6 June, 1916.) (C. M. O. 17, 1916, 10.)

3. **Death in, not the result of misconduct**—From the "findings of fact" arrived at by the court of inquiry in a recent case, it appears that deceased was placed under arrest upon the charge of absence over leave, and on the way to the place of confinement, while in charge of an acting master at arms, was struck by a Navy truck, which passed over his chest, causing his death shortly thereafter.

The opinion of the Attorney General of 17 May, 1855 (7 Op. Atty. Gen. 149), which has been accepted by the department as the basis for its rulings in line of duty cases, is in part as follows: "In regard to arrest again suppose that on march, in camp or garrison, or on a voyage, an officer is put in arrest on charges. In the first place, those charges may not be substantiated, and then it would be manifestly unjust that the mere fact of his being charged should operate to deprive himself or his family of pension. Or, while he is in arrest, he dies of camp fever or ship fever, and then it is unjust to presume a criminality not proved in the course of law. Or, whether guilty or not, if he die of wounds, casualty, or disease contracted while in arrest, still the death is not the consequence of the arrest, but of public service. If not dying in arrest, and on trial being convicted and sentenced, that sentence be of death or dismissal for some grave military crime, that, of course, terminates the question of pension; but if his offense be a light one with a sentence of reprimand, for instance, and he shall have happened to contract disability or mortal disease while in arrest, as by the hazards of a long march or voyage, it seems not just to add to his legal sentence the serious indirect aggravation of incapacity of pension."

The view taken by the Interior Department in pension cases involving this question was expressed in the decision of the Assistant Secretary of the Interior of 26 October, 1903 (14 P. D. 213), in which it was held (quoting syllabus):

"A disease contracted by soldier while in confinement awaiting trial for a breach of military duty is not necessarily incurred without the line of duty, and when the soldier is acquitted or died while awaiting trial a disease so contracted is held to have been incurred in line of duty."

In the course of the decision, the Assistant Secretary of the Interior stated:

"From the records it does not appear with what offense the soldier was accused, but it does appear that he was never tried; therefore, in the eyes of the law and of the department it must be and is presumed that he was innocent, no competent authority having pronounced him guilty. * * * The very essence of the long line

of decisions holding that a soldier is not in line of duty when undergoing punishment is the fact that he, by his own disobedient act, knowingly and wilfully placed himself without the line of duty; and when this is not the fact, in submitting to arrest and confinement awaiting trial, he is merely obeying his superior officers, thus doing his duty as a soldier."

In view of the foregoing the department decided that the death of the man in question was incurred in the line of duty and was not the result of his own misconduct, thus overruling a former decision of 30 April, 1919, in the same case. (File 26250–2015, Sec. Nav., 6 June, 1919; C. M. O. 209, 1919, 22.)

4. **As affecting the kind of discharge to be issued**—An enlisted man while returning from leave of absence was struck by a taxicab coming out of an alleyway. The car gave no warning nor was there anything to show that the injury was due to any misconduct or fault on the part of the victim. He was discharged for physical disability as the result of the injury received and was given an ordinary discharge, with character good. His marks were such as to entitle him to an excellent character had he been discharged for disability incurred in line of duty; but by reason of the holding that his disability was incurred not in the line of duty he was given only an ordinary discharge with good character.

Held, That if he was otherwise entitled on his record to an honorable discharge with excellent character, the records of the department should be corrected to show that his disability was incurred in the line of duty; that the character of his discharge should have been excellent and he should be informed that the records of the department have been so corrected. (File 7657–390:32, J.A.G., 20 July, 1920; *See also* C. M. O. 85, 1920, 16; C. M. O. 191, 1920, 16.)

5. **Aviation.** *See* AVIATION.

6. **Being off duty, is not a deciding factor**—A yeoman in the United States Navy on duty at the United States naval headquarters, London, England, was killed by a motor bus in the immediate vicinity of said headquarters, but about three hours after he had completed his duty for the day. The evidence indicated that the deceased was confused by the traffic, which, according to English regulations, keeps to the left side of the road. The Attorney General said in effect that a soldier in camp is not always occupied in the actual performance of some military duty. During the periods of rest he is more or less free to walk around within the limits of the camp. When he is assigned to duty not in a camp but in a city, he has the same freedom during the hours that he is not actually engaged in performing military duties. In the former case, he has the limits of the camp for recreation; in the latter case the Government furnishes no place where he is required to remain. In the case stated his duty as a soldier had taken him to a foreign city. After a day's work was done he was not required to remain in any particular place. It was contemplated, of course, that during his periods of rest he would pass more or less through the streets of London. Such an accident as is liable to happen to any one pursuing such a course would be the logical incident of his service in London. He was in the line of duty at the time of his death just as much as if he had been walking around in a camp in which he was stationed. (File 26250–1491:1, June 2, 1920; C. M. O. 85, 1920, 16.)

7. **Cases; under cognizance of the Surgeon General of the Navy**—Under the existing organization of the Navy Department the determination in cases arising upon reports of survey as to whether disease was incurred in line of duty is a matter under the cognizance of the Surgeon General, whose rulings thereupon can not be reviewed by the Judge Advocate General except when directed by the Secretary of the Navy. However, the section of the law providing compensation for disease contracted in the line of duty provides: "That for the purposes of this section, said officer, enlisted man, or other member shall be held and taken to have been in sound condition when examined, accepted, and enrolled for service." Accordingly, the ruling of the Surgeon General of the Navy that an officer of the Naval Reserve Force was not in sound condition when accepted for service could not, under the law quoted, deprive any person of the compensation provided by law for disease contracted in line of duty. The administration of the law quoted is under the Bureau of War Risk Insurance of the Treasury Department. (File 28550–1023, J. A. G., 15 May, 1919; C. M. O. 186, 1919, 36. *But see* C. M. O. 5, 1921, 17–23.)

8. **Change of records after discharge**—A man was discharged from the Navy with an ordinary discharge by reason of a medical survey in which origin of disability was stated as occurring "not in line of duty." The Bureau of Navigation was of opinion that the finding should have been "line of duty" and that the man in question "is

entitled to have the record changed" accordingly and to receive an honorable discharge and the benefits of compensation under the war risk insurance act. *Held*, That as the man in question has already been discharged pursuant to the report of medical survey to which exception is taken, his case should now, in accordance with precedent, be considered closed. The discharge which has been issued to him can not be revoked and a different form of discharge substituted, even should the Secretary decide that the facts in his case might have been sufficient to support a finding of line of duty. His rights under the war-risk insurance act may be determined by the Bureau of War Risk Insurance upon the facts as found by that bureau to exist, without regard to the decision of this department. It has been the policy of the Bureau of Medicine and Surgery to furnish the Bureau of War Risk Insurance with all the facts in any case, without an expression of opinion. Any additional evidence should, in accordance with precedent, be attached to and made a part of the man's record, but in accordance with repeated decisions of the Secretary, no changes should be made in the entries of record in his case. (File 7657-686, J. A. G., 7 Jan., 1919; C. M. O. 39, 1919, 21.)

9. **Death due to heart trouble, in line of duty, although deceased was under arrest.** (File 26250-1436, Sec. Nav., 23 Nov. 1918. *See also* G. C. M. Rec. No. 38822; C. M. O. 174, 1918, 23.)

10. **Disability resulting from injury received or disease contracted in**—General rules relating thereto. (C. M. O. 5, 1921, 17.)

11. **Death in**—About a week before his death, the deceased complained of indigestion and colicky pain in his abdomen and at times of discomfort in the region of the heart. An examination of the heart disclosed that it was perfectly normal. The deceased was treated for indigestion and a few days later said he was feeling better. While engaged in a game of golf, the deceased complained of "terrible indigestion" and upon returning to the clubhouse, fell dead. The board of inquest held in the case found that the deceased died by reason of heart failure while on authorized liberty, and that his death was occasioned by a disease which was contracted in the line of duty. The department held that the death occurred in line of duty and was not the result of misconduct. (File 26250-1841, J. A. G., 19 Mar., 1919; C. M. O. 114, 1919, 18.)

12. **Same**—A board of inquest in a recent case found that the deceased, late yeoman second class, United States Navy, died at 5.50 a. m. on May 6, 1918, in King George's Hospital, London, England, by reason of cerebral hemorrhage, caused by being struck by a motor bus while on authorized liberty, and expressed the opinion that the death was not occasioned by an act of duty in which the deceased was engaged, and was not the result of his own misconduct. The evidence before the board was to the effect that the accident which caused the death occurred "soon after 9 o'clock on Saturday night, May 5, at the corner of Ebury Street." There was no evidence that he was on leave at the time. There was testimony to the effect that "he was not on duty, as his duty consisted of clerical work, which required him to be on duty during daily office hours." The daily office hours of the deceased were 10 a. m. to 6 p. m., during which hours he was required to be on duty at the naval headquarters. He was on duty at said headquarters from 10 a. m. to 6 p. m. on Saturday, May 5. It could not be definitely ascertained whether or not the deceased was proceeding either to or from naval headquarters at the time of the accident which happened in front of said headquarters, but it was known that he finished his duty at headquarters at 6 p. m. on that date.

The Secretary of the Navy sustained the finding of the board, i. e., that death had occurred not in line of duty. (File 26250-1372, J. A. G., and Sec. Nav., 20 Feb., 1910; *see also* as to deaths while absent from duty on liberty, file 26250-1491 : 1, 29 Oct. 1918, and cases there cited; C. M. O. 77, 1919, 20. *But see* C. M. O. 85, 1920, 16.)

13. **Death in, due to fault, negligence and inefficiency of another**—Privates A and B were both on sentry duty, their posts being adjacent. Prior to the shooting A had loaded his pistol preparatory to investigating a disturbance in the neighborhood of his post. Afterwards, he neglected to unload his pistol before leaving his post, thereby violating orders. B was at his post at the time of the shooting, which according to his ante-mortem statement, occurred as follows:

"We were in building 352 about 5.40 this morning and A and I were fooling. We both pulled out our pistols and were snapping them at each other. I pulled mine out first and snapped at him, but when he went to snap at me, it went off and I was hit in the head. I was about 20 feet away from him with my back partly turned. It was not the kid's fault, as we were both fooling and we had had no trouble of any kind. We kidded each other this way before."

A's testimony, after explaining how he had happened to load his pistol and the circumstances under which he had afterwards entered building No. 352, which was within B's post, continues as follows:

"B just made a kidding remark to me to get out of this building and he drew his pistol and as we passed each other he snapped it two or three times at me. I paid no attention but went on and carelessly drew my pistol and swung around along my side and pulled the trigger. The pistol exploded and I looked around just as B was falling."

Private B died, later in the day, from the effects of the wound thus received.

The court of inquiry in this case was of the opinion that the death of B was caused through the fault, negligence and inefficiency of A; that the death of B was not in line of duty but was not caused by an act of his own misconduct for the reason given on page 290, Naval Courts and Boards, 1917, viz:

"Again it has uniformly been held that an enlisted man is not in line of duty while engaged in scuffling or squabbling with his companions, or voluntarily engaged in what is commonly known as 'horseplay' although at the time on board the ship to which he was attached."

On the foregoing statement of facts the Judge Advocate General rendered an opinion substantially as follows:

"The court, in its opinion, quoted correctly from page 290 of Naval Courts and Boards. However, on the following page of said publication it is stated:

"As was stated by the Attorney General in an opinion rendered July 22, 1881, with respect to the question of what constitutes disability incurred in line of duty 'it is impossible to lay down a general rule which will be applicable to cases of this kind, or to the different aspects which the * * * claim might present, as the facts shall be developed by the evidence.'

"In the present case, the evidence clearly established that B was on duty at his post at the time of the shooting and the facts warrant the statement in the recommendations above quoted, that his death was due to the 'fault, negligence and inefficiency' of A. The fault, negligence, and inefficiency of others in the service constitute a part of the dangers of the service to which an enlisted man may be exposed while in the line of duty. In this case it is true that B departed from the rules of proper conduct in snapping his weapon at A but such departure was slight as compared to the serious results and was not reasonably calculated to lead to violence, nor was his death the natural and reasonable consequences of such conduct.

"In the Attorney General's opinion of July 22, 1881 (17 Op. Atty. Gen. 172), the question was considered of line of duty in the case of an officer who, while traveling under orders and engaged in expediting the checking of his baggage, was struck by the baggage-master on the head with a hatchet, from the results of which he was seriously disabled. In the course of his opinion the Attorney General said:

"'Mr. Whetmore's assumption of the duties of his office caused him to be subject to orders: the orders caused him to come in contact with the baggage-master. If there did not intervene between this contact and the injury an adequate and sufficient cause for which Mr. Whetmore was responsible, he is entitled to his pension. * * * It cannot be said, on the one hand, that a soldier is entitled to a pension unless the provocation he gave was such as to acquit the assailant in a court of law, nor on the other that the slightest departure from the rules of proper conduct, followed by an injury shall preclude allowance of his claim. Between the two are an infinite variety of supposable cases involving different degrees of provocation, which can not be measured so as to determine as a matter of law their adequacy to produce the result * * * all circumstances (are) to be considered in determining what, in my judgment, is the real question, whether Whetmore's conduct in the baggage room was reasonably calculated to lead to violence dangerous to himself. * * * You are to determine whether the assault was the natural and reasonable consequence of Whetmore's actions or language.' * * *

"In the present case the action of B in snapping his unloaded weapon at A was misconduct which might have subjected him to disciplinary action, but in my judgment, such misconduct was not reasonably and logically calculated to cause his death, but the killing was due, as stated by the court, to the 'fault, negligence, and inefficiency' of A. Had B's weapon been loaded when he pointed it at A and had it been accidentally discharged in the course of 'scuffling' with the latter for the posession of the weapon, thereby causing B's death, it might have been properly held within the rule quoted by the court from Naval Courts and Boards and have characterized the death as not in the line of duty and even as the result of his own mis-

conduct. But the weapon of B was not discharged, nor was it loaded, and his death was caused not by his act in pointing the weapon at A, but by the latter's action in discharging a loaded weapon at him. If the killing was the reasonable and natural consequence of B's action in snapping his weapon at A, then the death of B was due to his own misconduct, for, as above stated, his action in snapping his weapon at A was misconduct. However, the court has said that the death of B was not due to his own misconduct, which is equivalent to a finding by the court that the death was not due to the action of B in snapping his weapon at A. If not due to the misconduct of B—that is, to his action in snapping his weapon at A—then the death must have occurred in line of duty, resulting from the fault, negligence, and inefficiency of another person in the service, which, as above stated, constitute a part of the dangers to which enlisted men are exposed while in the line of duty.

"In view of the foregoing, it is my opinion that in this case it may properly be held that the death of B occurred in the line of duty and was not the result of his own misconduct. (File 26250-2145, J. A. G., 16 July, 1919; C. M. O. 237, 1919, 23.)

14. **Death in, result of medical treatment**—A certain enlisted man contracted syphilis not in line of duty and as a result of his own misconduct. Five doses of salvarsan were administered by proper medical authority, and the patient died from salvarsan poisoning. In the opinion of the medical officer in charge of the case, the disease (syphilis) would not have caused death at the time death did occur. It was held that since the patient's death was the direct and immediate result of the treatment administered to him by proper medical authority, that the death of the deceased occurred in line of duty. It is immaterial that the disease for which he was being treated was contracted not in the line of duty and was acquired as a result of his own misconduct, the fact being established that death was not the result of the disease but of the medical treatment for the disease. (File 26543-213, J. A. G., 29 Apr., 1918; C. M. O. 37, 1918, 23.)

15. **Injured person—Will be responsible for intervening causes not connected with the service**—The mere fact that an injury or disease is coincident in time with service is not sufficient to class it as suffered or contracted "in the line of duty." It must have been caused by the presence of its victim in the line of duty when it was received or contracted. But the relation of causation is sufficiently shown when it appears that the victim was at a place and doing what was required or permitted by his duty as a soldier, and that, between his presence and conduct and the injury or disease, no adequate and sufficient cause for which he is responsible intervened. He will be responsible for an intervening cause if (1) it consists of his own willful misconduct, or (2) it is something which he is doing in pursuance of some private avocation or business.

A third intervening cause for which a soldier will be responsible is "something which grows out of relations unconnected with the service or is not the logical incident or probable effect of duty in the service." (File 26250-1491: 1, June 2, 1920; C. M. O. 85, 1920, 16-18.)

16. **Intervening cause—Domestic relations is an example**—A yeoman (female) in the United States Naval Reserve Force was killed by her husband while she was returning to her home upon the completion of her duty for the day. Her husband, who committed suicide, left notes from which it appeared that this action was due to the alleged unfaithfulness of his wife. The Attorney General in this case held that as the death resulted from jealousy on the part of the husband, and grew out of domestic relations entirely separate and distinct from her relations to the Government or the service, there was an intervening cause which had no connection with her service, and her death can not be said to have occurred in the line of duty. (File 26250-1491: 1, June 2, 1920; C. M. O. 85, 1920, 17.)

17. **Same—Voluntary participation in altercation while on leave as an example**—An officer of the Naval Reserve Force while on leave of absence was injured by a pistol shot in attempting to assist a woman in distress on his return from Coney Island to his home. The injury was held by the medical department not in line of duty solely because of the officer's status on leave of absence. The Attorney General held that the officer could not be denied compensation merely because he was injured while on a temporary leave of absence. He said, in effect, that the question is whether the injury resulted from a cause intervening between his service and the accident. The injury resulted from his creditable act in going to the assistance of a woman in distress. It is assumed that he was complying with the terms of his leave of absence when he went to the place at which he received his injury. An accident which was

ordinarily liable to happen to one at that place would therefore be a logical incident of his service. His injury, however, was not received as the result of his mere presence at that place. It resulted from the performance by him of a duty which he owed not as a soldier or as an incident to his military or naval duties, but as a member of society. It had no connection with his service, but was a duty which any man under the circumstances owed to society. The Attorney General, therefore, was of the opinion that there intervened in this case a cause growing out of his relations not to the service but to the public and that he can not be said to have been in the line of duty within the meaning of the statute. (File 26251-1491:1, June 2, 1920; C. M. O. 85, 1920, 18.)

18. **Navy Department records should not be changed to conform to those of the Bureau of War Risk Insurance**—X, while a member of the Naval Militia of the State of New York and a member of the National Naval Volunteers, not on active duty with the Navy, sustained an injury to his right ankle on or about 2 July, 1916, on board the U. S. S. ———, through the fall of a motor dory from its davits. In April, 1917, the Naval Militia of New York, of which he was a member, was mobilized and he performed active duty with his battalion until 16 April, 1917, when he was released from the Federal service, but not discharged from the State militia. He was discharged 22 November, 1918, upon the recommendation of a board of medical survey for physical disability, origin not in the line of duty, disability not the result of his own misconduct. It now appears that X is receiving compensation from the Bureau of War Risk Insurance as though his disability had been incurred in the line of duty. The question presented is whether the Navy Department should change its records so as to indicate that X's disability was incurred in the line of duty. *Held*, that the injury having been incurred prior to the time that X entered on duty with the Navy, either as a National Naval Volunteer or a member of the Naval Reserve Force, it was not incurred in the line of duty, and that the records of the department should not be changed to show that it was in the line of duty. (File 7657-390:33, J. A. G., C. M. O. 48, 1920, 31.)

19. **Ordinary incidents of a usual furlough**—An electrician in the United States Naval Reserve Force on duty at Boston, Mass., was granted liberty on Saturday until the following Monday. On Sunday afternoon he left Boston with a party bound for his home in Berlin, N. H., returning, he left Berlin late Sunday night as a passenger in an automobile for the purpose of reporting at his station and duty in Boston on time Monday morning; he met his death the same night (Sunday) in consequence of the automobile in which he was traveling being struck by a railroad train. The Attorney General expressed the view that in the case of a furlough for the purpose of engaging in some private avocation or business a soldier is for the time being not employed in active service and while so engaged he is not, therefore, within the terms of the act. An ordinary furlough or short leave of absence, however, is a part of the disciplinary regulations of the military service and the furloughed soldier is still, generally speaking, employed in the active service and in the line of duty, so long as he complies with the regulations and with the terms of his furlough. Such a furlough, of course, contemplates traveling by the ordinary means and such accidents as are liable to happen to one so traveling are logical incidents of the service. In the case stated it was undoubtedly the duty of the electrician to return to his post before the expiration of his furlough. He was doing this when the accident causing his death occurred; there was no intervening cause for which he was responsible; and he was therefore in the line of duty within the meaning of the statute. (File 26250-1491:1, June 2, 1920; C. M. O. 85, 1920, 17.)

20. **Same**—An enlisted man on authorized leave of absence from his ship at Brest, France, was injured while en route to Paris by the accidental discharge of a pistol in the hands of a soldier riding beside him on the train. The Attorney General held that this man was in Europe solely because he was in the active service under the Navy Department. As a part of the disciplinary regulations of the service, he was given a temporary leave of absence and permitted to visit Paris. On the way to Paris the accident occurred and he was injured, just as any other pasenger on a train might have been injured. There was no intervening cause for which he was responsible and he was therefore in the line of duty within the meaning of the statute. (File 26250-1491:1, June 2, 1920; C. M. O. 85, 1920, 17.)

21. **Precedents of Navy Department sustained**—The Navy Department's precedents upon the question of what constitutes "line of duty" are based upon the construction of these words in an exhaustive opinion rendered by Attorney General Cushing in 1855 (7 Op. Atty. Gen. 149). With reference to this opinion it was stated in 1897 by the United States Circuit Court of Appeals for the Eighth Circuit: "The fact that after this construction Congress has retained this expression (line of duty) for more than 40 years, although it has repeatedly revised and amended the pension laws, amounts to a demonstration that Mr. Cushing * * * properly interpreted it meaning" (Rhodes *v.* U. S. 79 Fed. Rep. 740). In 1881 it was remarked by Attorney General McVeagh: "The phrase 'in the line of duty' has been uniformly used in the statutes from 1779 to the present time in defining the right to pensions. It received elaborate discussion from Mr. Attorney General Cushing in 1855 (7 Opin. 149), and as Congress, since the publication of that opinion, has not seen proper to substitute any other expression, we are justified in concluding that it stands in the statutes invested with the meaning expressed by Mr. Cushing (17 Op. Atty. Gen. 172). Referring to the pension law, Mr. Cushing stated: "It does not say 'any disease not the consequence of misconduct' and if that had been the category contemplated by the legislator, he would have propounded it in simple and apt phraseology." (7 Op. Atty. Gen. 153, 156, 160.)

The rulings of the War Department based upon Mr. Cushing's opinion, having been brought to the attention of the Senate, and having been concurred in by eminent Members of that body as legally correct and "compelled" by the language "line of duty" as used in the law then under consideration (act 11 May, 1908, 35 Stat. 108, providing for payment of death gratuities) there was promptly passed, upon motion of Senator Bacon, an amendment substituting the words "not the result of his own misconduct" for the words "contracted in the line of duty," as used in said act. (See 43 Cong. Rec. 2688, 2689.) This amendment became law as part of an act approved 3 March, 1909 (35 Stat. 735). Several years later the act of 13 May, 1908 (35 Stat. 128), relating to the Navy, was similarly amended. (See act 22, Aug., 1912, 37 Stat. 329.)

The particular case under consideration by the Senate was that of one Capt. John K. Moore, whose death was held by the War Department to be not in line of duty, although clearly not the result of his own misconduct; and it was to extend the provisions of the law to cover similar cases occurring in the future that the amendment was proposed. Nevertheless, on 3 February, 1913, the Court of Claims rendered a decision with reference to the case of the same Captain Moore, in which it remarked that the amendment did not broaden the application of the original statute "in the least" and that said original statute applied "wherever the soldier dies while in the service generally and submitting to its rules and regulations, from wounds or disease not the result of his own misconduct." In this decision the court did not cite the opinion of Attorney General Cushing, the decision of the United States Cirtuit Court of Appeals in which said opinion was expressly adopted, the long-established precedents of the War and Navy Departments and Pension Bureau, or the history of the legislative enactments relating to line of duty. It should also be said that the death of Captain Moore, upon the facts as found by the Court of Claims, was clearly in line of duty under the principles enumerated by Attorney General Cushing, and no reversal of precedents was necessary to the allowance of the claim in that case.

The Navy Department has never adopted the remarks of the Court of Claims above quoted, but has continued to follow the opinions of the Attorney General, the decision of the Circuit Court of Appeals, and the established precedents of the Government which received legislative sanction in the amendments made to the death gratuity statutes, as above cited, and which had been previously brought to the attention of Congress in connection with the rulings of the Interior Department in pension cases. (*See*, for example, H. Doc. No. 5, vol. 3, 54th Cong., 2d sess., p. 74.)

It having now been recommended that the department's rulings be changed to conform to the remarks of the Court of Claims in the Moore case, *Held*, That such remarks of said court are not sufficient to override the established precedents and prior decisions on the subject; but advised that the question be submitted to the Attorney General for a ruling by him as to whether the opinion of his department requires modification or should be regarded as overruled by said decision of the Court of Claims; and that the action to be taken by this department be determined in accordance with the advice of the Attorney General. (File 26250–1491:1, J. A. G., 29 Oct., 1918; C. M. O. 77, 1919, 20.)

22. **Refusal to undergo operation will not alter the cause.** *See* SURGICAL OPERATION.

LINE OF DUTY AND MISCONDUCT. (C. M. O. 7 (17); 9 (14); 12 (16), 1921.)

1. **Construed—Suicide.** (File 26250–864, Sec. Navy, Dec. 28, 1916.)

LONGEVITY.

1. **Propriety of computing service performed in Medical Reserve Corps in determining.** (C. M. O. 280, 1919, 16.)

LONGEVITY PAY.

1. **Naval Academy service**—The act of 18 May, 1920, does not remove restrictions as prescribed in act of 4 March, 1913, that service as midshipmen shall not count in computing length of service. (File 29199–4:5, Sec. Navy, 27 Sept., 1920; C. M. O. 119, 1920, 16.)

LOSS.

1. **Of public property.** *See* PUBLIC PROPERTY.

LOSS OF NUMBERS. *See* NUMBERS, LOSS OF.

1. **Computation**—A lieutenant commander in the Navy was sentenced to lose 25 numbers in his grade. On the date of approval of the sentence the list of lieutenant commanders of the permanent Navy immediately below him, counting 25 numbers down the list from him, included 19 officers who had been selected and promoted to temporary commander and 6 permanent officers in the grade of lieutenant commander who had not been selected or promoted. Query: Should the 19 lieutenant commanders of the permanent Navy who had been selected and promoted to temporary commanders be counted in computing said loss of numbers? *Held*, That they are as much entitled to places in the permanent list as those who were not selected and promoted temporarily and they should be counted as lieutenant commanders in computing the numbers lost by the officer in question. (File 11130–51, J. A. G., 13 Mar., 1918; C. M. O. 30, 1918, 29.)
2. **Purpose and calculation**—A sentence to loss of numbers has particular application to cases where promotion goes by seniority, and is intended to operate as so to delay the promotion of the officer so sentenced. The promotion by selection of an officer who stood, on the lineal list, below the officer so sentenced, is a reward personal to the officer receiving it. Any effect which it may have on other officers is incidental and does not affect one officer over whom the promotion is made more than another. By a parity of reasoning, it follows that it can not operate as a pro tanto execution of the sentence to loss of the numbers of one of the officers over whom the promotion is made, and who happened to be subject to such a loss, so imposed. (File 26521–100:1, J. A. G., July 28, 1917; C. M. O. 46, 1917, 22.)
3. **Sentence of a temporary officer**—A temporary captain in the Marine Corps was appointed a second lieutenant in said corps on 6 October, 1916, for a probationary period of two years from 29 September, 1916. He was promoted to temporary first lieutenant from 22 May, 1917, and to temporary captain from 23 May, 1917. He was tried by general court-martial and was sentenced "to lose forty (40) numbers in his grade." He is not now serving in the grade of second lieutenant (probationary) although such is his permanent status to which he is authorized to revert on the termination of his temporary commission in a higher grade. His grade is that of captain in the Marine Corps, which is the grade in which he was serving when sentenced and in which he should lose the specified numbers. In the opinion of the Judge Advocate General no other construction would be justified in the absence of an express sentence of the court that he is to lose numbers or seniority in his permanent grade. Inasmuch as he was not sentenced to loss of numbers or seniority or to suspension from promotion in his permanent grade of second lieutenant (probationary) the loss of numbers adjudged should be computed in his temporary grade only and he should be examined for permanent promotion at the same time as the probationary second lieutenants of the same date of appointment. (File 26521–263, J. A. G., 28 Mar., 1918; C. M. O. 30, 1918, 32.)

LOSS OF PAY. *See* PAY, LOSS OF.

1. **Sentence involving.** (C. M. O. 10, 1921, 10.)

MAKING INCONSISTENT STATEMENTS BEFORE AND AT GENERAL COURT-MARTIAL AS A WITNESS.

1. **Does not constitute an offense**—The making of merely inconsistent statements by an individual does not constitute any offense known to the naval service. This is fully supported by the procedure before naval courts-martial, which affords a witness an opportunity to subsequently correct, alter, or amend the statements made by him before the court. (Naval Courts and Boards, 1917, secs. 175 and 176, File 26262–5120; G. C. M. Rec. No. 40142; C. M. O. 141, 1918, 22.)

MALTREATING A PERSON SUBJECT TO HIS ORDERS.

1. **As a lesser degree of "Scandalous conduct tending to the destruction of good morals."** (C. M. O. 212, 1919.)

MANSLAUGHTER. *See* MURDER.

1. **Defective specification under charge of**—Did not allege with sufficient definiteness facts which if true would show the homicide was felonious. (C. M. O. 39, 1919, 15.)
2. **Specification to charge of**—How properly drawn. (C. M. O. 39, 1919, 15.)

MARINE CORPS.

1. (C. M. O. 9, 1921, 15.)
2. **Reappointment of temporary and reserve officers, act of 29 August, 1916.** (C. M. O. 8, 1921, 18.)
3. **Retirement of former officers of Marine Corps Reserve and former temporary officers.** (C. M. O. 8, 1921, 18.)
4. **Status of probationary second lieutenant relative to transfer under act of June 4, 1920.** (C. M. O. 10, 1921, 11.)
5. **Transfer from Marine Corps Reserve to Regular Marine Corps, under the provisions of the act of June 4, 1920.** (C. M. O. 9, 1921, 15.)
6. **Appointment in staff departments of.** *See* PROMOTIONS.
7. **Enlistments abroad.** *See* ENLISTMENTS.
8. **Serving with the Army**—Naval authorities are without jurisdiction to review the proceedings or action of the Army authorities in courts of inquiry, etc. (File 26250–2335, Sec. Navy, 18 Dec., 1920; C. M. O. 151, 1920, 16.)
9. **"Naval service"**—Marine Corps as part of naval service. (C. M. O. 37, 1916, 7; 21 Comp. Dec. 70.)
10. **Reinstatement of former officers**—Under provisions of the act of August 29, 1816. (39 Stat. 619, 611; C. M. O. 37, 1916, 8.)
11. **Temporary warrant officers and clerks to assistant paymasters**—The Secretary of the Navy is authorized to make as many temporary and permanent appointments as may be necessary to complete the authorized number of warrant officers and clerks to assistant paymasters in the Marine Corps, and in the event of any of the appointees being temporarily commissioned, he is authorized to make temporary appointments to fill their places. The appointments to fill their places must of necessity be temporary for the reason that the warrant officers and clerks to assistant paymasters of the permanent Marine Corps are entitled to revert to the position from which they were commissioned. The eight clerks to assistant paymasters holding temporary places authorized by the act of May 22, 1917, while eligible for appointment as temporary second lieutenant, are not entitled to revert to the grade of clerk to assistant paymaster on the expiration of their temporary commission. If they are appointed second lieutenant, the vacancy thus created may be filled by temporary appointment for the period of the war. (File 17789–30, J. A. G., July 24, 1917; C. M. O. 46, 1917, 22.)

MARINE CORPS RESERVE.

1. **Members serving as gunners on board vessels of the merchant service**—So far as their Marine Corps Reserve membership is concerned there is no legal objection to members of such service serving on board merchant vessels as gunners. In the event of war or a national emergency as declared by the President to exist, such members of the Marine Corps Reserve, so serving, could be ordered to perform duties in the Naval service. (File 28553–5, J. A. G., Mar. 12, 1917; C. M. O. 22, 1917, 9.)
2. **Service in gendarmerie**—Enlisted men of the Marine Corps Reserve, while in the active service of the United States, pursuant to the call of the President, may be detailed to duty with the Haitien Gendarmerie if such detail is considered administratively desirable. Their eligibility for such duty ceases when they are released or discharged from the active service of the United States. (File 5526–33: 1, Sec. Navy, 18 Sept., 1917; C. M. O. 58, 1917, 12.)

MARINE HOSPITAL SERVICE.

1. **Retention of members of the Navy**—Officers of the Marine Hospital Service may not retain enlisted men of the Navy in a United States marine hospital, as a matter of punishment (C. M. O. 32, 1917), but where an enlisted man of the Navy has, by competent authority, been ordered to treatment in a United States marine hospital, he has no more legal right to leave that hospital without proper permission than he has to so leave any other place to which he has been lawfully assigned; and should an enlisted man under the circumstances stated, unlawfully absent himself, he would be guilty of absence without leave or desertion, as the case may be; and upon full

report of the facts in the case by the public health officer to the commanding officer of the offender, it is believed that said offender could be appropriately punished either by his commanding officer or by court-martial proceedings. (File 28092-21: 3, J. A. G., 16 Jan., 1918; C. M. O. 4, 1918, 19.)

MARINE OFFICERS.

1. **When embarked as separate organizations, court-martial record must affirmatively show jurisdiction**—The act of 29 August, 1916, as set forth on page 19, General Order No. 231, provides as follows:

"When a force of marines is embarked on a naval vessel, or vessels, as a separate organization, not a part of the authorized complement thereof, the authority and powers of the officers of such separate organization of marines shall be the same as though such organization was serving at a navy yard on shore, but nothing herein shall be construed as impairing the paramount authority of the commanding officer of any naval vessel over the vessel under his command and all persons enmbarked thereon." Marine officers convening courts-martial in conformity with the above, shall show that they are legally empowered to convene said courts by signing themselves thus:

(*a*) At the beginning of the precept: From commanding officer, Provisional Brigade, embarked upon and not a part of the authorized complement of the U. S. S. ———.

(*b*) In approving the proceedings, findings and sentence: A———. B. C———, ———, U. S. Marine Corps, Commanding Provisional Brigade, embarked upon and not a part of the authorized complement of U. S. S. ———. (File 26287-3262, Sec. Navy, 24 Jan., 1918; C. M. O. 4, 1918, 19.)

MARK OF DESERTION.

1. **Removal of**—Department refused to remove a mark of desertion, as it had been correctly entered. (File 1236-D, J. A. G., May 16, 1902; 20, J. A. G., 201.)

MAYHEM.

1. **Definition of**—At common law, mayhem is such an injury to any part of a man's body as may render him less able in fighting either to defend himself or to annoy his adversary. Therefore, the cutting off, disabling or weakening of a man's hand or finger, or striking out his eye or foretooth or emasculating him, was said to be mayhem, but the cutting off of his ear or nose was not mayhem at common law, because such injuries did not disable or weaken him but merely disfigured. It was therefore held that a specification which alleged that the accused had, in a fight, bitten off a portion of the right ear of another, did not allege the common law offense of mayhem charged. (File 26262-1864, G. C. M. Rec. No. 39466; C. M. O. 114, 1918, 27.) But see U. S. Crim Code Sec. 283.

MEDALS.

1. **Foreign**—Acceptance of, by officers of the Navy and Marine Corps. (C. M. O. 186, 1919, 37.)
2. *See also* GOOD CONDUCT MEDALS.

MEDICAL CORPS.

1. **Distribution of commissioned personnel in lower grades**—In the distribution of medical officers between the grades below medical inspector under the act of 29 August, 1916, the following numbers should be regarded as established by law and not to be reduced in consequence of anything contained in the act of August 29, 1916; 87 in the grade of surgeon and 232 in the grades of passed assistant and assistant surgeon. There is no fixed distribution between the grades of passed assistant and assistant surgeon, except, for the specific authorization of two passed assistant surgeons contained in the act of 12 June 1916,, section 4 (39 Stat. 224). (File 27233-37, J. A. G., 6 Apr., 1918; C. M. O. 37, 1918, 24.)
2. **Seniority as to officers.** *See* STAFF OFFICERS.
3. **Temporary officers and officers of temporary rank**—Acting assistant surgeons, United States Navy, are eligible for temporary appointment as additional assistant surgeons under the act of May 22, 1917, as are other citizens of the United States, properly qualified. They do now, however, by operation of law, revert to the position of acting assistant surgeon upon the termination of the temporary appointment; but there is nothing in the act to prevent their reappointment as acting assistant surgeon.

Assistant surgeons, Medical Reserve Corps, and assistant dental surgeons, Dental Reserve Corps, are eligible for temporary appointment as additional assistant surgeons, United States Navy (with rank not above lieutenant) and assistant dental surgeons, United States Navy (with rank not above lieutenant (junior grade)), re-

spectively, as are other citizens of the United States, properly qualified; and by their acceptance of such appointments, they do not forfeit their commissions in such Medical and Dental Reserve Corps.

The act of 22 May, 1917, does not authorize the advancement of dental surgeons, United States Navy, having less than five years' service in the grade, to the rank of lieutenant. (File 15229–13, J. A. G., July 14, 1917; C. M. O. 46, 1917, 23.)

MEDICAL EXAMINATION.

1. **Submission by defendant to**—Objection was made at trial, by accused's counsel, to the testimony of a medical officer with regard to a physical examination of the accused, made shortly after his arrest, the objection being based upon the theory that the examination was in violation of the constitutional rights of the accused, he being thereby compelled to give evidence against himself. Counsel contended that the accused in obeying the medical officer's order to expose his person did so, believing that it was obligatory upon him to comply with the same. Accused, testifying in his own behalf, said that had he known he was being examined in order to obtain evidence to be used against him he would have protested against such examination.

The department was of opinion that the submitting by a defendant to a medical examination is not a confession, although the result is to disclose facts of a criminating character (see 12 Cyc. 460). Moreover, the accused in this case made no protest when asked to expose his person for examination. Consequently, the testimony of the medical officer was properly admitted by the court; the fact that the accused was ignorant of the purpose of the examination, also the question whether he exhibited his person voluntarily or by order, are immaterial; the evidence obtained from such examination if material, was competent (*see* Adams *v.* New York, 192 U. S. 585; Holt *v.* United, States, 218 U. S. 245; State *v.* Garrett, 71 North Carolina, 85). (File 26262–6441 J. A. G., 4 June, 1919; C. M. O. 209, 1919, 17.)

MEDICAL OFFICERS.

1. **Composition of court for trial of**—While the convening authority is the judge of what officers the "exigencies of the service" will "permit" to be ordered as members of the court "without injury to the service," still, in the opinion of the department, the convening authority is justified in departing from the rules as set forth in article 39, A. G. N., and section 221, Naval Courts and Boards, 1917, only under the most unusual circumstances. (File 26262–4590, G. C. M. Rec. No. 38822; C. M. O. 92, 1918, 16.)

MEDICAL TREATMENT.

While on leave or furlough. (C. M. O. 7, 1921, 18.)

MEMBERS OF COURTS-MARTIAL.

1. **Acting assistant dental surgeons as**—*Held*, That an acting assistant dental surgeon may be a member of a summary court-martial, being an "officer not below the rank of ensign" as required by article 27, A. G. N., but not being a "commissioned officer" as required by article 39, A. G. N., is not eligible to service as member of a general court-martial. (File 26504–301, J. A. G., 8 Mar., 1917; C. M. O. 22, 1917, 7.)
2. **Absence**—Though they may be commanders of vessels about to sail, they must secure authority of the convening authority to be absent from court-martial duty except in an emergency to be judged by their commanding officers. (File 26262–7997, 13 Dec., 1920; G. C. M. Rec. No. 50654; C. M. O. 151, 1920, 15.)
3. **Absence on leave granted by commanding officer**—A member of a general court-martial may not absent himself from court upon leave granted by his immediate commanding officer. A member or judge advocate is relieved as such only by lawful order of the convening authority. (Naval Courts and Boards, 1917, sec. 225; File 26262–3714, J.A. G., 21 Dec., 1917; C. M. O. 88, 1917, 14.)
4. **Challenged by accused, and challenge sustained, should withdraw.** (C. M. O. 6, 1921, 25.)
5. **Disclosure of the vote or opinion of any member**—The oath taken by the members of a general court-martial and set forth in article 40 of the Articles for the Government of the Navy, forbids the disclosure of the vote or opinion of any particular member of the court. That this refers to disclosures outside of court, and not among the members themselves, is clearly evident from the procedure adopted in reaching a finding and sentence as set forth in sections 318 and 336, Naval Courts and Boards, 1917. Under the former section, each member subscribes his name to the decision reached by him and hands the same to the president of the court; and under the latter, in addition to following a similar course to that pursued in arriving at a finding, the court, when a majority fail to concur upon the nature and degree of the punishment, proceeds

viva voce to determine upon a sentence. The reasons for a court reaching the findings it does, can be ascertained from the members, even without revealing to each other the votes on the questions involved, by pursuance of a similar method to that outlined in these sections. (C. M. O. 16, 1918, 5.)

6. **Effect of absence of, on validity of proceedings**—Even though absence of members of general courts-martial be not warranted by section 87, Naval Courts and Boards, 1917, in that consent of the convening authority to such absence was not obtained, if the court is not reduced below a legal quorum (five), its proceedings are not invalidated by such absence of some of its members. (File 26251-17883, G. C. M. Rec. No. 40277; C. M. O. 141, 1918, 23.)
7. **Record of proceedings should affirmatively show their presence.** *See* RECORD OF PROCEEDINGS.
8. **Summary court members may be required to divulge their vote to proper higher authorities**—In its action on a summary court-martial the department referred to the remarks contained in C. M. O. 42, 1915, 8, published in the Naval Digest, 1916, page 425, section 47, and commented as follows: "Although from the foregoing citation the conclusion has been established that under certain circumstances the members of a summary court-martial may be required to divulge their votes to proper higher authorities, a case justifying disciplinary action of any nature against any such members on account of the findings or sentence of the court would have to show in a convincing manner that he had not been guided properly by the evidence adduced or the laws for the Government of the Navy, these requirements being imposed by his oath, equally with the mandates of his conscience. There is no thought conveyed that a court-martial, in the course of its deliberations, under any circumstances, could be openly threatened with disciplinary action; most emphatically is this true in a case such as the one under consideration, where the necessary elements are by no means apparent to warrant disciplinary action in the case of any member of the court." (File 26287-4045, Sec. Navy, July 28, 1917; C. M. O. 46, 1917, 20.)
9. **Testimony**—Witnesses who testified during absence of a member of a court should be recalled to verify testimony given during such absence. (C. M. O. 84, 1917.)
10. **Court-martial orders**—Members of courts-martial are bound by their oaths to consult and apply information in Court-Martial Orders. *See* COURT-MARTIAL ORDERS.
11. **Eligibility of naval militia officer**—An officer of the naval militia not in active service under call of the President but attached to a command for "routine practical instructions" only, may not be ordered to act as recorder of a summary court-martial. (File 26287-3802, Sec. Navy, Mar. 15, 1917; C. M. O. 22, 1917, 11.)
12. **Leave of absence**—A telegram from the convening authority temporarily assigning an officer as member of a general court-martial is not sufficient to warrant the court in excusing another member. (Naval Courts and Boards, 1917, sec. 242; File 26251-14396, J. A. G., 14 Dec., 1917; C. M. O. 88, 1917, 14.)
13. **Not sworn.** (C. M. O. 6, 1921, 25.)
14. **Qualifications**—As a general rule members of naval courts-martial are not qualified by training and experience to strip reported (civil) cases of technical terminology and weigh the principles announced in the various citations with assurance of deducing therefrom the correct conclusions of law. (File 26251-12159, Sec. Navy, Dec. 9, 1916, p. 2.)
15. **Retired officers as.** *See* RETIRED OFFICERS.
16. **True function of members**—The true function of a naval court-martial is applying the law to the facts as it finds them, etc. (C. M. O. 25, 1916, 4.)
17. **Valid challenge**—Where the trial of an accused for disobeying the orders of his superior officer is recommended by such superior officer, and such superior officer is a member of the general court-martial before whom the accused is ordered for trial, the accused may validly challenge such member. (Naval Courts and Boards, 1917, sec. 222; File 26251-14396, J. A. G., 14 Dec., 1917; C. M. O. 88, 1917, 14.)

MEMBERS OF NAVAL SERVICE.

1. **They are not subject to disciplinary action of officers of the Public Health and Marine Hospital Service.** *See* PUBLIC HEALTH AND MARINE HOSPITAL SERVICE.

MEMORANDUM OF LAW.

1. **By counsel for accused**—Setting forth issues of law, i. e., right to public trial, composition of the court, power to recall from active duty, and reasonable doubt as to guilt. (C. M. O. 48, 1920.) *See also* CONSTITUTIONAL RIGHTS OF ACCUSED, JURISDICTION.

MESS TREASURER, CHIEF PETTY OFFICER.

1. **Status of—with relation to article 14, A. G. N.**—The department has held that—(1) The duly elected treasurer of the mess is no wise an agent of the Government; (2) the commuted rations of each member of such a mess when paid to said treasurer, are no longer public funds, and may be expended by him in such manner as the mess may direct; (3) the function of the auditing board appointed by the commanding officer is to determine whether said treasurer has properly expended or accounted for the funds of the mess.

   In view of the above, it was held that specifications which alleged that a mess treasurer of a chief petty officers' mess did, in rendering his official statement of the accounts of said mess to the members of the mess, and the auditing board, etc., present as a voucher a receipted bill from a certain named firm for a certain named amount, well knowing the said bill to be false and fraudulent and to represent more than the true amount of the purchases from said firm, etc., did not support the charge of "Making false and fraudulent official reports in violation of article fourteen of the Articles for the Government of the Navy" because the offense was not against the United States. (File 26262-3363; G. C. M. Rec. No. 41585; C. M. O. 190, 1918, 18.)

MIDSHIPMEN. (C. M. O. 9, 1921, 15.)

1. **Are members of naval forces of the United States during war**—A midshipman appointed to the United States Naval Academy 2 July, 1918, and who served as such until 9 September, 1920, when his resignation was accepted, is considered by the Navy Department as having been a member of the naval forces of the United States during the war against Germany and Austria and entitled to the $60 war bonus allowed by the act of Congress approved 24 February, 1919. (File 5252-160, Nov. 6, 1920; C. M. O. 133, 1920, 15.)
2. **Dismissed but subsequently pardoned may not enroll in the Fleet Naval Reserve.** *See* FLEET NAVAL RESERVE.
3. **Eligibility of**—For preference in appointment to civil service positions. (C. M. O. 296, 1919, 14.) *See* CIVIL SERVICE.
4. **Eligibility of candidates for midshipman terminates on last day of their twentieth year**—"Full age in male or female is 21 years, which age is completed on the day preceding the anniversary of a person's birth. If he is born on the 1st of January he is of age to do any legal act on the morning of the last day of December, though he may not have lived 21 years by nearly 48 hours; the reason assigned is that in law there is no fraction of a day and if the birth were on the first second of one day and the act on the last second of the other, then the 21 years would be complete, and in law it is the same thing whether a thing is done upon one moment of the day or another. (1 Bl. Comp. 463; Metcalf, Cont., p. 38.)"

   The Judge Advocate General therefore expressed the opinion, which was approved by the Secretary of the Navy, that the candidates eligibility terminated with 31 March, 1920, and not 1 April, 1920. (File 26509-229; 5, J. A. G., 5 Feb., 1920; C. M. O. 48, 1920, 31.)
5. **In Naval Academy**—Are neither soldiers, sailors nor marines. *See* CIVIL SERVICE. (C. M. O. 296, 1919, 14.)
6. **Line of duty**—A midshipman who, during his course at the Naval Academy, incurs injuries or disease, is to be given "line of duty" or "not line of duty" by the medical officer preparing the records in the same manner and for the same causes that similar entry would be made on reports to the Bureau of Medicine and Surgery for commissioned and warrant officers and enlisted men of the Navy and Marine Corps. (File 5252-24, Sec. Navy, May 25, 1909.)
7. **Nomination as second alternate for midshipman by Senators**—Legal requirements. (File 1747-03; 22 J. A. G., 345.)
8. **Status after graduation, under the provisions of the act of August 29, 1916, and March 4, 1917**—The act of March 4, 1917, authorizes graduation of midshipmen who have completed a three year course at the Naval Academy. The number of officers in the grade of lieutenant (junior grade) and ensign is limited by the act of August 29, 1916. A sufficient number of vacancies will not exist in the line of the Navy to admit of commissioning all graduates of the Naval Academy, prior to July 1, 1917. In the meantime, such graduates may be appointed as acting ensigns; or may be commissioned as ensigns in the Naval Reserve Force or may be ordered to duty as "midshipmen after graduation." (File 5252-83, J. A. G., Mar. 20, 1917; C. M. O. 22, 1917, 9.)

9. **Status of.** (C. M. O. 4, 1921, 15.)
10. **Status of while at Naval Academy.** (C. M. O. 9, 1921, 16.)
11. **The law as to reports against them must be strictly followed**—The letter of the law with regard to reports against midshipmen must be followed and it would therefore be illegal under section 1 of the act of 9 April, 1906 (34 Stat. 104), for the Superintendent of the Naval Academy to submit a report in the first instance to the midshipman against whom charges are preferred under such section, for his comment, and then to the Secretary of the Navy, together with such comment, for final action, instead of submitting it to the Secretary of the Navy in the first instance, then to said midshipman and again to the Secretary of the Navy, as now required by the letter of the law. (File 5252–162, Nov. 5, 1920; C. M. O. 133, 1920, 15.)

MILEAGE.

1. **It can not be surrendered by officers**—It is held that an officer of the Navy can not surrender his right to mileage or to any other emolument or allowance pertaining to his office and prescribed by statute and that any effort on his part to waive such right is without effect. (File 26290–78, J. A. G., Mar. 9, 1917, referring to decision of Court of Claims in re paymaster's clerk Katzen; Glavey *v.* U. S., 182 U. S. 595; U. S. *v.* Andrews, 240 U. S. 90, cited therein; C. M. O. 32, 1917, 6.)

MILEAGE UPON DISCHARGE.

1. **When payable.** (C. M. O. 114, 1919, 18.)

MILITARY COMMISSIONS.

1. **Conduct of, under naval jurisdiction**—Military commissions should, in general, correspond to a general court-martial both as to its constitution and to its proceedings. Except in a case where the convening authority may for military reasons direct otherwise, all evidence taken before such commissions shall be recorded as in general courts-martial. A military commission should be limited in the punishment which it may adjudge only to such an extent as the convening authority may deem proper. (C. M. O. 15, 1917, 8.)
2. **Mitigation of sentences after approval by convening authority**—The military governor of territory occupied by naval forces of the United States has inherent power, as the representative of the President of the United States, to remit fines or parole prisoners under sentence of exceptional military courts convened by him or in his name, except insofar as his powers in this respect have been restricted by orders of superior authority. There are no rules or regulations of the department limiting the powers of a military governor in this respect.

   Subordinates of the military governor, although they may be empowered by him to convene exceptional military courts in his name, do not possess the power to mitigate sentences after they have once acted thereon, such power being personal to the military governor to whom the records of such exceptional courts must be referred in all cases after action has been taken thereon by subordinates who have been regularly authorized to convene such courts. This is the department's interpretation of the instructions contained in Naval Courts and Boards (pp. 18 and 19). (File 16870–497, Sec. Nav., 22 Oct., 1920; C. M. O. 127, 1920, 13.)
3. **Procedure and conduct when convened by naval authority**—When exceptional military trials, whether by military commission or provost courts, are held by naval authority, the commission or court conducting such trials shall be constituted and organized, and shall conduct its proceedings in the manner provided for naval courts-martial or deck courts, so far as the exigencies of the service may permit. Similarly, records shall be kept of the proceedings, which upon completion shall be transmitted to the Judge Advocate General of the Navy to be revised and recorded. No sentence of death shall be carried into execution until confirmed by the Secretary of the Navy; all other sentences may be executed upon approval of the convening authority. The jurisdiction of every such commission or provost court, in the matter of the punishments which it may adjudge, shall be limited in the discretion of the convening authority and shall be expressly stated in his order convening such commission or provost court. (File 5526–39; C. M. O. 13, 1916, 6.)
4. *See also* COURTS, EXCEPTIONAL MILITARY; SUPERIOR COURTS; SUPERIOR PROVOST COURTS; PROVOST COURTS.

MILITARY COURTS. *See* MILITARY COMMISSIONS.

MILITARY EQUIPMENT.

1. **Receiving as a pledge, is punishable**—"* * * every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor or other person called into or employed in the military or naval service any arms, equipment, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than $1,000 nor more than $5,000." (File 26804–10; C. M. O. 72, 1917, 18.)

MILITARY INFORMATION.

1. **Discussion being prohibited, it is immaterial that it contains inaccurate statements**—An officer was tried for violating General Order No. 300 which prohibits the discussion of military matters in time of war. It was contended that as the statement made by the accused was untrue, there was no information conveyed in the words used and that even did it turn out to be true he did not have knowledge of its truthfulness and therefore he could not be guilty of wilfully and knowingly violating the order in question. *Held*, That the order was a prohibition against discussions or the making of comments, relative to the matters set forth therein, and should be broadly considered and not restricted exactly to what was actually and positively taking place; it included even speculations as to probable dispositions or movements of naval or military forces. It is not essential that such words be entirely true; their truthfulness is immaterial, for the language of the order prohibits any discussion of questions relating to the disposition, movements, or proposed movements of naval or military forces, except as provided. (C. M. O. 29, 1918.)

MINORS.

1. **Who fraudulently enlist**—Rights of guardian. *See* FRAUDULENT ENLISTMENT.

MISCONDUCT.

1. **Absence of officers and men as a result**—"Hereafter no officer or enlisted man in the Navy or Marine Corps in active service who shall be absent from duty on account of sickness or disease resulting from his own intemperant use of drugs or alcoholic liquor, or other misconduct, shall receive pay for the period of such absence, * * *" (39 Stat. 580). *Held*, That a person in the Navy or Marine Corps should not be penalized in accordance with the terms of the above act for misconduct committed prior to his entry into the service. (File 7657–394:21, J. A. G., January 26, 1917.) *Held, further*, That it does not prohibit the receipt of pay by officers or men of the Navy or Marine Corps, on the sick list or otherwise, for time absent from duty on account of injury resulting from their own intemperant use of drugs, alcoholic liquor, or for other misconduct. (Comp. Dec., Nov. 22, 1916; *see also* C. M. O. 33, 1916, 5–6; 41, 1916, 5; C. M. O. 3, 1917, 6.)

MISSING SHIP.

1. **Should be charged as "Conduct to the prejudice of good order and discipline."** (C. M. O. 3, 1916, 7.)

MISTAKE OF FACT. *See* Naval Digest, 1916, "Intent," 2.

MITIGATION. *See* SENTENCE.

1. **Sentences involving bad-conduct discharge.** (C. M. O. 11, 1921, 19.)

MODIFICATION OF PRECEPT.

1. **Judge advocate**—Document relieving one judge advocate and appointing another is modification of precept but does not authorize erasure and substitution in original document. (C. M. O. 82, 1917, 3.)

MONEY REQUISITIONS.

1. **Special money requisitions of enlisted men**—Against whom charges have been preferred, should not be authorized. *See* COMMANDING OFFICERS.

MOTION TO STRIKE.

1. **Counsel for accused made motion to strike out a charge and specification in that Navy Regulations (R-1409) had not been complied with**—Court referred record back to convening authority who rightly refused to pass on the motion, the decision of the matter being solely within the province of the court. (C. M. O. 12, 1919.)

2. **Instead of introducing evidence**—Matters of evidence can not be availed of by motion to strike out the charge and specification, as where the specification alleged desertion from a certain ship at a certain place and counsel for the accused move to strike out the charge and specification because official publications showed the ship in question to be elsewhere on that date. (File 26251–25544, 5 Nov., 1920; G. C. M. Rec. No. 50211; C. M. O. 133, 1920, 13.)

MULTIPLICITY OF CHARGES. *See* CHARGES AND SPECIFICATIONS.

MULTIPLICITY OF TRIALS. (C. M. O. 9, 1921, 10.)

1. **Improper**—An accused was tried by summary court-martial three separate and distinct times on the same date for offenses which might have been disposed of at one trial. *Held*, One trial should have been held, the accused having three specifications preferred against him as is provided in Forms of Procedure, 1910, page 156, thereby saving the time of the accused and the members of the court and avoiding the clerical work involved in preparing the multiplicity of records. (File 26287–3303, J. A. G., Feb. 12, 1916; C. M. O. 5, 1916, 6.)

MURDER.

1. **Distinguished from manslaughter.** (C. M. O. 5, 1921, 13.)
2. **Distinguishing characteristics.** (C. M. O. 5, 1921, 14.)
3. **Jurisdiction of general courts-martial over crime of**—In a recent general court-martial case, the counsel for the accused objected to the jurisdiction of the court to try the accused for murder, on the ground that the alleged offense "was committed on board a United States ship of war on the high seas" and "that such a ship constitutes the territory of the United States within the sense that jurisdiction over such place and offense committed therein lies exclusively with the United States Federal courts." The court very properly overruled this objection.

   Article 6, A. G. N. (sec. 1624, R. S.), provides that "If any person belonging to any public vessel of the United States commits the crime of murder without the territorial jurisdiction thereof, he may be tried by court-martial and punished with death." Section 272 of the Criminal Code of the United States, providing for the punishment of murder and other offenses committed within the admiralty and maritime and the territorial jurisdiction of the United States, gives the district courts of the United States jurisdiction of the crime of murder "when committed upon the high seas, or any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States or of any State, Territory, or District thereof."

   It is true that article 6, A. G. N., does not place exclusive jurisdiction in naval courts-martial of the crime of murder committed by a person belonging to the naval service on board a vessel of the United States outside the territorial jurisdiction thereof. The general rule is that the jurisdiction of the civil courts is concurrent as to offenses triable by courts-martial not of a purely military nature. (28 Op. Atty. Gen. 24; 6 Op. Atty. Gen. 413; U. S. *v.* Clark, 31 Fed. 710.) As to the crime of murder committed on board a public vessel of the United States on the high seas, there is no doubt that naval courts-martial have jurisdiction to try and punish the offender with death, and having once assumed such jurisdiction may proceed to a final judgment which, when duly approved, is legal and binding, despite the fact that the case was also cognizable and might have been taken jurisdiction of by the proper district court of the United States. (6 Op. Atty. Gen. 413; 28 Op. Atty. Gen. 24.) (File 26262–5400, G. C. M. Rec. No. 40814; C. M. O. 190, 1918, 26.)

MUTINY.

1. **Attempts to incite are seditious.** *See* SEDITION.

NAME.

1. **Correction in spelling of, in records of the department**—In order that the records of the department should as far as possible be correct, authority was granted to change the spelling of a name if an investigation satisfactorily established the fact that an error had been made when he first entered the service. (File 24368–29, Sec. Navy, 22 May, 1919; C. M. O. 186, 1919.)

2. **Right to change**—A stepson does not necessarily take his stepfather's name. In a case where the mother of a former enlisted man remarried, and he had requested that the department's records be changed so that he would be known under his stepfather's name, and that a new discharge be issued to him under such assumed name, the request was denied. (*See* File 24368–14, J. A. G., 24 Apr., 1915; C. M. O. 16, 1915, 6; Naval Digest, 1916, p. 395.) A man has the right to change his name without legal proceedings, and the name thus assumed is as much his legal name, for all purposes, as though he had borne that name from birth (18 A. & E. Ann. Cas. 701, 703; Naval Dig., 1916, p. 394). Yet there is no duty on the department to change his name on its records, and the department has heretofore uniformly declined to make such changes except in cases where legal steps to effect the change of name have been taken by the interested party, or in pursuance of statutory authority. (Naval Digest, 1916, pp. 395–396; C. M. O. 37, 1918, 25.)

NAME AND DESIGNATION OF ACCUSED.

Sentence—Name and designation of accused should be included in sentence. (C. M. O. 38, 1916.)

NATIONAL DEFENSE ACT. (30 Stat. 216). *See* DISCRIMINATION AGAINST UNIFORM.

NATIONAL DEFENSE SECRET.

Disclosing. (File 26251–12159, p. 22.)

NATIONAL NAVAL VOLUNTEERS.

1. **Administering of oath.** *See* OATHS.
2. **Citizenship of officers.** *See* CITIZENSHIP.
3. **Clothing on discharge**—They are entitled to one outfit of uniform clothing on discharge, and if these articles of uniform clothing were restored to the Government at the time of discharge, they should be returned to them or there should be issued to them articles similar in kind and value. (File 26254–2593: 170, Sec. Navy, 27 Sept., 1920; C. M. O. 119, 1920, 17.)
4. **Officers may administer naval discipline.** *See* ADMINISTRATION OF NAVAL DISCIPLINE.

NATIONAL NAVAL VOLUNTEERS: COAST GUARD.

Right to command. *See* COMMAND.

NATURALIZATION. *See also* ALIEN ENEMY; CITIZENSHIP.

NAVAL ACADEMY. Foreign students—Status of in re graduation. (C. M. O. 186, 1919, 34.)

NAVAL AUXILIARY RESERVE.

1. **Right to command**—In case a vessel commanded by a lieutenant in the regular Navy falls in with a vessel commanded by a lieutenant commander in the Naval Auxiliary Reserve, the duties and responsibilities of senior officer present would devolve upon the lieutenant (commanding) in the regular Navy, this situation, growing out of the provisions of the act of August 29, 1916, which limits the exercise of military command by officers of the Naval Auxiliary Reserve to ships to which they are attached "and in the Naval Auxiliary Reserve." (File 11130–44, J. A. G., 5 Sept., 1917; C. M. O. 58, 1917, 12.)
2. **Salutes between officers**—The Naval Auxiliary Reserve is a part of the Naval Reserve Force. Any lieutenant commander of the Naval Auxiliary Reserve, ranking as he does with lieutenant commanders of the Navy, is of superior rank to any lieutenant in the Navy. Inasmuch as the junior of two officers meeting is required to salute his senior first (R–1173) it follows that a lieutenant in the regular Navy is obliged to salute first a lieutenant commander in the Naval Auxiliary Reserve. (File 11130–44, J. A. G., 5 Sept., 1917; C. M. O. 58, 1917, 13.)
3. **Visits between officers**—Visits exchanged between such officers under the conditions such as vessels of both organizations falling in with each other are of two kinds and are to be governed under the laws and regulations by quite different rules. If the visit to be made is one of ceremonial character only, it should be made by the junior (lieutenant, regular Navy) upon the senior (lieutenant commander, Naval Auxiliary Reserve); if, however, the visit is one made in conformity with the spirit of Article I–1007 (3), it should be made by the subordinate (as to command status), viz, the lieutenant commander, Naval Auxiliary Reserve, upon the senior officer present (lieutenant, regular Navy). (File 11130–44, J. A. G., 5 Sept., 1917; C. M. O. 58, 1917, 12.)

NAVAL COAST DEFENSE RESERVE.

Enrollment of women—Women may be enrolled in the Naval Coast Defense Reserve organized under the act of August 29, 1916. (File 28550–45, Sec. Navy, Mar. 14, 1917; C. M. O. 22, 1917, 10.)

NAVAL COMMISSION PENNANT.

1. **Its significance**—"From the earliest days of the Navy the commission pennant, sometimes called the narrow pennant, or the coach-whip pennant, in order to distinguish it from the broad pennant of a commadore or the triangular pennant of the senior officer present, has been universally recognized as the distinguishing mark of a vessel in commission; this means in *naval* commission, or in commission for naval service as differentiated from simply nautical service of a character other than naval." (C. M. O. 76, 1920, 19.)
2. **Proper use of**—A ship of the Navy exclusively engaged in the duty of nautical school ship of a State of the Union may not fly the United States naval commission pennant. The ship in question, although carried on the list of vessels of the Navy, is neither in naval commission or in the service of the United States while operating as a nautical school-ship—really a part of the State educational system—of a separate State of the Union. While there may be no statutory enactment defining in detail the uses to which the naval commission pennant may legally be put, this pennant is peculiarly a naval insignia, appropriate only to exclusively naval employment; and the regulations governing its display properly and authoritatively emanate from the Navy Department. Such regulations are not in conflict with existing laws; quite to the contrary, they are in keeping with the spirit of the statutes relating to the regulations of executive departments and are supported by a long line of decisions and precedents. (File 8103–19: 14, J. A. G., 14 May, 1920; C. M. O. 76, 1920, 20.)

NAVAL EXAMINING BOARD.

1. **Any doubt must be resolved against the candidate**—The finding of a court-martial, even if proved, would not be conclusive upon an examining board for the reason that a court-martial can not properly arrive at a finding of guilty unless the evidence establishes the guilt of the accused beyond a reasonable doubt; while, on the other hand, members of an examining board are not required to be satisfied beyond a reasonable doubt that a candidate is not qualified for promotion, but instead are forbidden to recommend any officer for promotion as to whose fitness a doubt exists. (File 26260–3342: 1, Sec. Navy, Apr. 7, 1916; C. M. O. 13, 1916, 7.)
2. **Commissioned warrant officers as candidates for commissioned rank**—The department held that the naval examining board convened by its precept of 26 June, 1920, will determine the rank or grade to which commissioned warrant officers of more than 15 years' service should be transferred. The department will then determine their precedence when so transferred. (File 11130–72: 1, J. A. G., 16 July, 1920; C. M. O. 101, 1920, 19.)
3. **Constitution of**—It is not permissible to change the constitution of any statutory board (as a naval examining board) without first obtaining authority from the Secretary of the Navy for such change. *See* File 23027–154:3, Sec. Navy, Dec. 26, 1916, where such a change was ratified.
4. **Finding must express the opinion which the members themselves entertain**—A naval examining board found in effect, that, no matter what its personal feelings may be, a certain candidate was morally qualified for promotion because the members of a court-martial had acquitted him of serious offenses and that the board had not the power to question the findings of said court. *Held*, That the fact that a case has been acted upon, or that no action has been taken, does not close that portion of an officer's record to which it relates in such a manner as to relieve an examining board from the responsibility of scrutinizing it; and, even in the event of an acquittal by court-martial, an examining board still has the duty cast upon it by express provisions of law to examine into the facts and outcome of such trial in order to determine for itself the effect, if any, that should be given thereto with reference to the officer's qualifications for promotion. (File 5878–97; 26260–697; 26260–1392.) (File 26262–3342:1, Sec. Navy, Apr. 7, 1916; C. M. O. 13, 1916, 6.)

NAVAL DIGEST,

Court—It is error for court to decide contrary to Naval Digest. (C. M. O .81, 1917, 2.)

NAVAL HOME.

1. **Money benefits**—Of beneficiaries of the Naval Home under R. S. 4756 and act of June 30, 1914 (38 Stat. 398). (*See also* act of Mar. 3, 1883, sec. 4 (22 Stat. 564); File 26510-1022, J. A. G., December, 1916.)
2. *See also* PENSION.

NAVAL HOSPITALS. *See* HOSPITALS.

NAVAL MILITIA.

1. **Officers as members of court-martial.** *See* MEMBERS OF COURT-MARTIAL.
2. **"System of discipline"**—The laws and regulations of the Navy which prescribe the system of training, the duties and rights, and the general rules of conduct of persons in the Navy, apply to the Naval Militia under the act of August 29, 1916 (39 Stat. 599); but not the laws and regulations of the Navy which provide for the enforcement of discipline by means of punishment. (File 8124-55, J. A. G., Oct. 17, 1916; C. M. O. 37, 1916, 7.)

NAVAL PERSONNEL.

Will not be delivered to civil authorities in time of war. *See* CIVIL AUTHORITIES.

NAVAL RESERVATION.

Arrest of photographer. *See* ARREST.

NAVAL RESERVE.

1. **Continuous service pay.** *See* PAY.
2. Status of men discharged from the former Naval Reserve by operation of the law on August 29, 1916. (*See* C. M. O. 41, 1916, 7.)

NAVAL RESERVE FLYING CORPS.

Transfer—There is no authority of law for the transfer of enlisted men (aviation detail) United States Navy, to warrant or commissioned grades in the Naval Reserve Flying Corps. (File 7657-454, J. A. G., July 9, 1917; C. M. O. 46, 1917 23.)

NAVAL RESERVE FORCE.

1. *See also* MARINE CORPS RESERVE.
2. **Acceptance of certain employment by members of.** (C. M. O. 77, 1919, 23.)
3. **Active duty**—Members of the Naval Reserve Force may, until December 31, 1921, and with their consent, be ordered to perform duty ashore of a kind not ordinarily performed by civilians; and the acts of July 11, 1919, and June 4, 1920, are not in conflict in this regard; and each is effective. (File 29226-2, J. A. G., 23 July, 1920; C. M. O. 101, 1920, 20.)
4. **Active, inactive, or discharged officers of. Eligibility for retirement**—"Only officers of the Navy and Naval Reserve Force entitled to the benefits of the retirement laws relating to the naval service. (*See* 14 Op. Atty. Gen. 506; 29 Op. Atty. Gen. 249; 19 Op. Atty. Gen. 203.) The former officers of the Naval Force who have been discharged from the service are not now officers of the naval service, but are civilians, and as such are not entitled to retirement under the laws relating to retirement in the naval service. (File 28550-1155, J. A. G., 11 Aug., 1919; C. M. O. 268, 1919, 15.)
5. **Affiliation of an officer of, with American Federation of Labor**—No law prohibits while on an inactive duty status. (C. M. O. 280, 1919, 17.)
6. *See* File 29697-10, J. A. G., Oct. 31, 1916.
7. **Confirmation of officers of**—The act of 29 August, 1916, provides:

   "No person shall be appointed or commissioned as an officer in any rank or class of the Naval Reserve Force, or promoted to a higher rank therein, unless he shall have been examined and recommended for such appointment, or promotion by a board of three naval officers not below the rank of lieutenant commander, nor until he has been found physically qualified by a board of medical officers to perform the duties required in time of war * * *." (File 28550-123; 11, J. A. G., 29 Aug., 1919.) *See* C. M. O. 2688, 1919, for discussion.
8. **Counting service for entry into the Naval Academy**—Active service as an enlisted man in the Naval Reserve Force may be counted in computing the time required for eligibility for entrance to the Naval Academy from the enlisted personnel of the Navy. (File 5252-146, Sec. Navy, 29 July, 1920; C. M. O. 101, 1920, 16.)
9. **Enlisted men in status of temporary officers can not be transferred to Fleet** Naval Reserve. (C. M. O. 186, 1919, 47.)

10. **Enlistment of, in land forces of State Militia**—That Congress specified "Naval Militia" in the act of 11 July, 1919, is sufficient proof that it intended to authorize members of the Naval Reserve to join only the naval forces of the State and not the land forces. The act of 29 August, 1916, provides that—

"No existing law shall be construed to prevent any member of the Naval Reserve Force from accepting employment in any branch of the public service, except as an officer or enlisted man in any branch of the military service of the United States or any State thereof, nor from receiving the pay and allowances incident to such employment in addition to his retainer pay. (File 28550–1216, J. A. G., 15 Nov., 1919; C. M. O. 304, 1919, 16.)

11. **Extension of enrollment.** *See* ENLISTMENT.
12. **Inactive**—May bid on contracts for supplies to be furnished the Government either on their own behalf or as an agent. (C. M. O. 35, 1929, 25.)
13. **Inactive**—May not be compelled to serve on active duty without their consent, and if they do not perform the minimum active service prescribed by law, the retainer pay due them may be withheld. (File 7657–1063, Sec. Navy, 12 June, 1920; C. M. O. 85, 1920, 19.)
14. **Inactive**—The department will not investigate reports concerning deaths of inactive reservists, but will make record of such reports on the files of the department. (File 28550–1386:1, J. A. G., 30 Dec., 1920; C. M. O. 151, 1920, 18.)
15. **Inactive, may receive rewards**—Members of the United States Naval Reserve Force on inactive duty are "persons in civil life," within the meaning of the act of 1 July, 1918 (40 Stat. 718), and during such period of inactive duty when they are given freedom of action with regard to public or private employment, they are eligible to receive cash rewards for beneficial suggestions made by them during such time. (File 28113–66, J. A. G., 29 May, 1920; C. M. O. 76, 1920, 16.)
16. **Jurisdiction of general court-martial to punish an officer of, for offenses committed while serving in an enlisted rating**—An accused was enrolled in the Naval Reserve Force 14 December, 1917, for a period of four years, as a yeoman, and later was given the provisional grade of assistant paymaster, with the rank of ensign, in the United States Naval Reserve Force, class 4, for general service. The department held that, as the person in question was not discharged from his enrollment, and said enrollment does not expire until 14 December, 1921, and that as he was not commissioned an officer in the Navy but was given a provisional assignment as such, the department has not lost jurisdiction to bring him to trial by general court-martial for offenses committed by him while serving in an enlisted rating under his current enrollment. (File 26251–20099; 5, J. A. G., 2 June, 1919; C. M. O 209, 1919, 24.)
17. **Members of, released to inactive duty**—While wearing the uniform of their respective ranks, grades, or ratings, are subject to the laws, regulations, and orders for the government of the regular Navy. (C. M. O. 39, 1919, 20.)
18. **Officers employed by firms furnishing supplies to the Government.**—"* * * That hereafter no payment shall be made from appropriations made by Congress to any officer in the Navy or Marine Corps on the active or retired list while such officer is employed * * * by any person or company furnishing naval suppiles or war material to the Government; and such employment is hereby made unlawful after this date." (Act of 10 June, 1896, 29 Stat. 361.) *Held*, That this provision applies to officers of the Naval Reserve Force during such time as they may by law be required to serve in the Navy, or when on active service at their own request or in authorized travel to or from such service. (File 28550–178, J. A. G., 8 Dec., 1917; C. M. O. 88, 1917, 16.)
19. **Officers**—May be continued on active duty with their consent until June 30, 1920, then without their consent until peace is declared, and then only with their consent and for training, except that those confirmed may, with their consent, be employed afloat. The 500 authorized by the act of June 4, 1920, for aviation may only be employed in time of peace and with their consent. (File 26509–331:4, J. A. G., 22 June, 1920; C. M. O. 101, 1920, 21.)
20. **Officers**—The 500 authorized by the act of June 4, 1920, for aviation and auxiliary services does not serve to increase the number of staff officers authorized by law (File 25609–331:4, J. A. G., 22 June, 1920; C. M. O. 101, 1920, 21.)
21. **Officers**—Whether on active or inactive duty are eligible for appointment to the Navy, under the provisions of the act of June 4, 1920. (File 26509–331:4, 22 June, 1920; C. M. O. 101, 1920, 21.)

22. **Officers**—Who formerly held commissioned or warrant rank in the Navy, but who do not now hold commissioned or warrant rank in the Navy or Naval Reserve Force are not eligible for transfer and appointment in the Navy under the provisions of the act of June 4, 1920. (File 26509–331:4, J. A. G., 22 June, 1920; C. M. O. 101, 1920, 21.)
23. **Officers**—Whose enrollment had expired, but whose cases were held up by the department pending the determination of their rights to retirement, are de facto officers and entitled to the benefits of legislation granting the right of retirement to officers of the Naval Reserve Force who heretofore had incurred physical disability in the line of duty. The department having taken jurisdiction over their cases to determine the right to retirement can, with their consent, retain such jurisdiction until the final conclusion of the action, even though the terms of their enrollment have expired. (File 26253–776; 26253–770:1; 26253–760:1, J. A. G., 12 Aug., 1920; C. M. O. 115, 1920, 16.)
24. **Precedence.** *See* PRECEDENCE.
25. **Promotion of officers.** (C. M. O. 4, 1921, 18.)
26. **Promotion without examination**—An enrolled member of the Naval Reserve Force who has been given a provisional rank may hereafter, either with or without being confirmed in such provisional rank, be given a higher provisional rank without examination. While the provisions of the act of 29 August, 1916, requiring a particular kind of formal examination for those "appointed or commissioned" as officers of the Naval Reserve Force or "promoted" to a higher rank therein might, if standing alone, be broad enough to cover provisional assignment, yet when read in connection with other provisions they clearly connote only permanent appointments. (Op. Atty. Gen. 20 Oct., 1917.) (File 28550–123:4, Sec. Navy, 23, Oct., 1917; M. C. O. 67, 1917, 19.)
27. **Provisional appointment**—One holding a provisional rank or rating in the Naval Reserve Force may lawfully have his present rank or rating changed, for adequate reasons, to a different provisional rank or rating, there being nothing in the law which prevents the proper administrative officer from correcting the provisional enrollment of an officer by assigning him a new provisional rank shown by his service, or facts subsequently ascertained, to be more appropriate to his qualifications. (File 28550–123, J. A. G., 16 Aug., 1917; C. M. O. 53, 1917, 13.)
28. **Provisional lieutenant sentenced to be placed at the foot of ensigns is irregular.** *See* SENTENCE.
29. **Rank on retirement.** (C. M. O. 4, 1921, 15.)
30. **Recalled for trial**—Members of the Naval Reserve Force may legally be recalled to active duty for trial by court-martial for offenses against naval discipline committed prior to their release from active duty. (C. M. O. 48, 1920, 10.)
31. **Retirement of officers.** *See* RETIREMENT.
32. **Retired officers will not be required to reenroll after being retired.** (C. M. O. 2, 1921, 22.)
33. **Retirement.** (C. M. O. 4, 1921, 16.)
34. **Status of naval reservists released from active duty with regard to preference in appointments**—Within the meaning of the provisions of the law (act of 11 July, 1919) granting preference in appointments, reservists relieved from active duty can not be regarded as "honorably discharged" from the Naval Reserve Force. The discharge of reservists on inactive duty will accomplish the purpose of securing their preferment for civil appointments. (File 4032–207:1, J. A. G., 25 Aug., 1919; C. M. O. 280, 1919, 17.)
35. **Transfer from, to regular Navy.** (C. M. O. 2, 1921, 21.)
36. *See also* FLEET NAVAL RESERVE.
37. **Seniority as to officers of the Regular Navy.** *See* STAFF OFFICERS.
38. **Service in Geodetic Survey does not count**—"Service in the Navy, Marine Corps, National Naval Volunteers, and Naval Militia shall be counted as continuous service in the Naval Reserve Force, both for the purposes of retirement of and computing retainer pay." (Act of July 1, 1918, 40 Stat. 710.) *Held*, That service in the United States Coast and Geodetic Survey can not be counted in computing continuous service increase in retainer pay of members of the Naval Reserve Force, unless such service was rendered under the jurisdiction of the Navy, in which latter event it may be so counted only by virtue of its being "service in the Navy" (File 26254–2593:168, J. A. G., 6 Oct., 1920; C. M. O. 127, 1920, 13.)
39. **Status of officers on inactive duty; writing for publications**—An enrolled member of the Naval Reserve Force on inactive duty may write for publication and comment upon any topic whatever without being subject to the laws, regulations, and orders for the government of the regular Navy, but, of course, the department would

be authorized to disenroll him from the Reserve Force as undesirable at any time should his publications appear to be in any wise detrimental to the interests of the naval service.

Transferred members of the Fleet Naval Reserve are at all times subject to the laws, regulations, and orders for the government of the regular Navy, and must necessarily, therefore, submit to the Navy Department any manuscript which they desire to have published. (File 3937-215:9, J. A. G., 26 Sept., 1919; C. M. O. 280, 1919, 18.)

40. **Wearing uniform**—Members of the Naval Reserve Force relieved from active duty are authorized to wear the uniform under the circumstances and subject to the conditions prescribed by the act of 1 July, 1918 (40 Stat. 712), and General Order No. 437 issued pursuant to said act. (File 5012-177, 14 Dec., 1920; C. M. O. 151, 1920, 18.)

41. **Confirmed**—Those who have performed three months' active service and were examined and found qualified for confirmation and rating prior to December 16, 1918, have been legally confirmed, and notification of such confirmation should be made, as they are legally entitled to the retainer pay. (File 28550-1373, J. A. G., 14 Sept., 1920; C. M. O. 119, 1920, 17.)

NAVAL RESERVISTS.

1. **Relieved from active duty prior to termination of four-year enrollment**—Are not entitled to return of court-martial fines checked under I-4893. (C. M. O. 77, 1919, 24.)
2. **Transferred to the regular Navy**—May extend enlistments. (C. M. O. 77, 1919, 24.)
3. **Transferred to the regular Navy**—Are entitled to refund of court-martial checkages. (C. M. O. 321, 1919, 15.)

NAVAL SERVICE.

Definition of—In connection with enrollments, transfers, and retirement of men in the Fleet Naval Reserve as provided in the act of August 29, 1916 (39 Stat. 589-591):

Held, (1) Previous service in the Marine Corps in the case of a man honorably discharged from the Navy can be construed as "naval service," and permit of his enrollment rate of pay allowed by law for men with 8 and 12 years' service, respectively, in the Fleet Naval Reserve. (In support of the proposition that service in the Marine Corps is comprehended in the expression "Naval service," see 21 Comp. Dec. 700.)

(2) For the purpose of permitting men with 16 and 20 years' service, respectively, to transfer to the Fleet Naval Reserve previous service in the Marine Corps may be construed as "Naval service" in computing their 16 or 20 years' service in the Navy, but previous service in the Army *can not* be so construed.

(3) For the purpose of determining the 30 years' service necessary for retirement, all service should be counted, namely, Army, Navy, Marine Corps, active Naval Reserve service as referred to in the act of March 3, 1915 (38 Stat. 940), and Fleet Naval Reserve service in the case of men transferred to and retired from the Fleet Naval Reserve.

(4) Members of the Fleet Naval Reserve upon retirement are entitled to have war service "computed as double time in computing the 30 years necessary to entitle" them to be retired in accordance with the Navy personnel act of March 3, 1899 (30 Stat. 1008). (File 26254-2114, Sec. Navy, Oct. 16, 1916; C. M. O. 37, 1916, 7.)

2. **Marine Corps**—As part of. *See* MARINE CORPS.
3. *See also* LIGHTHOUSE VESSELS.

NAVAL STATION.

An officer of the National Naval Volunteers in command is the commandant. *See* OATHS.

NAVIGATION.

1. **Joint responsibility**—Article R-1606, Navy Regulations, 1913, that directs that "The commander in chief shall direct the course to be steered by the fleet when at sea and is responsible for its safe conduct" does not apply in the case of a single ship and was not intended to make a flag officer responsible for the detailed handling of a ship on which he is a passenger; under such circumstances a flag officer is not charged with responsibility unless in his opinion the commanding officer of the ship is incompetent properly to discharge his duties. However, a flag officer who interferes with the navigation of a ship on which he is a passenger, thereby voluntarily assumes joint responsibility for the safe conduct of the ship and under such circumstances should be held responsible for the consequences. (C. M. O. 26, 1916, 3.)
2. **Navigator**—Concurrent responsibility for safety of his ship not to be avoided merely because of youth and being associated on the bridge with the captain and divisional officer. *See* ACQUITTAL.

NAVY.

Law of court-martial—In applying to naval courts-martial by analogy decisions in cases tried before court-martial of the Army, care must be observed to note differences in the laws governing the procedure of these two branches of the service. (C. M. O. 10, 1913, 7.)

NAVY MEDALS.

Award of—To members of military forces of allied powers, and to civilians. (C. M. O. 77, 1919, 24.)

NAVY REGULATIONS.

1. **Is not in conflict with the Manual for the Medical Department**—Therefore, members of the Nurse Corps may be granted by commandants of naval districts, yards, and stations, leave of 10 days, exclusive of travel time, without reference to the Bureau of Medicine and Surgery. (File 26477-99, J. A. G., 15 July, 1920; C. M. O. 101, 1920, 14.)
2. **Questions not covered by**—This fact will not relieve officers of responsibility imposed by their commission. *See* COMMISSIONS.

NEGLECT OF DUTY.

1. **Specification under charge of,** should set forth facts constituting, with precision and certainty. (File 26251-16184, G. C. M. Rec. No. 40570; C. M. O. 174, 1918, 19.)
2. **Specification to support must show that duty was assigned and entered upon**—In order to prove the offense "Neglect of duty" it is essential that the prosecution show that the accused had been assigned to and entered upon the duty alleged. (File 26262-5130, G. C. M. Rec. No. 40194; C. M. O. 141, 1918, 26.)

NEGLIGENCE.

Failure of engines in a collision—Does not absolve commanding officer. *See* COLLISION.

NEW TRIAL.

1. **Accused having declined the opportunity for a new trial, the sentence should be approved.** (C. M. O. 151, 1919.)
2. **Denied**—Not considered practicable in view of the fact that the accused and witnesses in case now at widely separated stations, and that to assemble them for the purpose of a new trial would involve delay and expense to Government. (C. M. O. 109, 1919.)
3. **Improper disallowance of challenge for opinion formed ground for petition for.** (C. M. O. 151, 1919.)
4. **In connection with court-martial proceedings**—After a sentence has been duly approved and has taken effect, the granting of a new trial is beyond the power of the reviewing authority or President.

   After such approval and execution the only relief which may be granted must result from the exercise of the pardoning power or from clemency in mitigating the sentence imposed. (File 26262-4529:1, Sec. Navy, 5 July, 1918; C. M. O. 92, 1918, 16.)
5. **Recommended**—Because a member of court had, prior to trial, formed an opinion as to guilt of accused. (C. M. O. 109, 1919.)
6. **Refused.** (C. M. O. 237, 1919, 25.)
7. **Rejected**—Accused does not desire new trial but suggests that as the proceedings were irregular, they should be invalidated. The suggestion can not be regarded seriously "that one who holds that he has been improperly convicted is entitled to reject out of hand the opportunity to have his case heard again, and at the same time maintain that having been tried and convicted in a manner not wholly to his satisfaction, the charges pending against him should be dismissed without the carrying into effect of the sentence adjudged by the court." (File 26251-16994; C. M. O. 141, 1919.)
8. **To request**—Accused should make formal petition therefor, before final action by department, upon receipt of which the same would be considered in connection with letters and inclosures submitted by him. (C. M. O. 141, 1919.)

NOLLE PROSEQUI.

Prior trial by summary court-martial for same offense—The accused was awaiting trial by general court-martial. The charges were withdrawn as he had been tried by summary court-martial for same offense. (File 7958-02;21 J. A. G., 126.)

NORFOLK NAVY YARD.

Acquisition of site for—An act of the Legislature of Virginia passed 25 January, 1800, authorized the governor of said State "to convey, transfer, assign and make over unto the United States, all interest in, and title to, as well as all the jurisdiction, which this Commonwealth possesses over the public lands commonly called and known by the

name of Gosport before mentioned, for the purpose of establishing a navy yard: *Provided*, That nothing herein contained shall be so construed as to prevent the officers of this State from executing any process whatever within the jurisdiction hereby directed to be ceded."

The above-mentioned land was accepted by the United States under the conditions contained in said act of the Legislature of Virginia and on 15 June, 1801, James Monroe, Governor of the State of Virginia, deeded the land to the United States for the consideration of $12,000, giving title and jurisdiction thereto subject to the reservation contained in the above-mentioned act of Legislature of Virginia that officers of said State were not to be prevented from executing any process whatever within the jurisdiction so ceded. (File 5267–1000, J. A. G., 10 Apr., 1920; C. M. O. 74, 1920, 12.)

NOT IN LINE OF PROMOTION.

Though affecting the promotion of certain officers—Of certain staff corps on the active list, does not operate to prevent their promotion to the rank of commodore on the retired list. (File 5552–29, J. A. G., 23 Jan., 1920; C. M. O. 85, 1920, 19.)

NUMBERS, LOSS OF.

Sentence—To loss of numbers manifestly inappropriate in case of officers on reserve list. (C. M. O. 66, 1917.)

NURSE CORPS.

1. **Amenability to naval discipline**—Members of the Nurse Corps (female) created by the act of 13 May, 1908 (35 Stat. 127, 146), are amenable to naval discipline, subject to such laws, naval regulations, instructions, etc., as are applicable to such corps. (File 26477–80, J. A. G., 20 Dec., 1917; C. M. O. 88, 1917, 16.)
2. **Leave.** (C. M. O. 7, 1921, 16.)
3. **Service of.** (C. M. O. 4, 1921, 16.)

OATH.

1. **Forbids disclosure of vote or opinion of any member of court.** *See* MEMBERS OF COURT-MARTIAL.
2. **"To try the case according to their own conscience."** *See* CONSCIENCE.
3. **Authority to administer oaths for naval justice and naval administration**—By the act of March 4, 1917, officers of the Regular Navy and Marine Corps and the Naval Reserve Force, of the Marine Corps Reserve, of the National Naval Volunteers, when designated by the Secretary of the Navy so to do, are authorized to administer oaths for the purpose of the administration of naval justice and for other purposes of naval administration. (File 19037–55, J. A. G., Mar. 13, 1917; C. M. O. 22, 1917, 10.)
4. **Marine officers may administer, for purposes of naval administration and naval justice**—"That * * * the adjutant and inspector, assistant adjutant and inspector, commanding officers, recruiting officers of the Marine Corps, and such other officers of the regular Navy and Marine Corps, of the Naval Reserve Force, of the Marine Corps Reserve, and of the National Naval Volunteers as may be hereafter designated by the Secretary of the Navy be, and they are hereby authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration." (Act of 4 Mar., 1917; 39 Stat. 1168, 1171.) *Held*, That a commander of an advance base force, being a commanding officer of the Marine Corps, has power to administer oaths for the purposes set forth; and the decision of the question as to whether or not an oath to be administered is for a purpose set forth in the act rests with the officer who is to administer the oath in each case. (File 19037–67, Sec. Navy, 3 Dec., 1917; C. M. O. 88, 1917, 16.)
5. **May be administered by officers of the National Naval Volunteers**—An officer of the National Naval Volunteers is authorized to administer an oath of office to an officer in the Regular Service when said officer of the National Naval Volunteers is serving in one of the capacities enumerated in the act of 3 March, 1917. And further, an officer of the National Naval Volunteers, serving as commanding officer of a United States naval training camp, is, under I–5354, Naval Instructions, 1913, defining a naval station to be "any establishment for * * * training under the control of the Navy," the commandant of a naval station and as such may execute acceptances and oaths of office for men who are promoted to officer's rank in the regular branch of the service. (File 19037–74, J. A. G., 8 Apr., 1918; C. M. O. 37, 1918, 25.)
6. **May be administered by recruiting officers to some persons not in the service**—In view of the provisions of Article R–1536, Navy Regulations, 1913, and the act of March 3, 1901 (31 Stat. 1086), it is held that the administering of an oath by a recruiting officer of the Navy to a person not in the naval service, who desires to make an

affidavit as to the date and place of birth of an applicant for enlistment in the United States Navy is authorized under the clause "and for other purposes of naval administration." (File 7751-03, J. A. G., Sept. 9, 1903; 19037-38, J. A. G., Sept. 25, 1913; 19037-45, J. A. G., May 26, 1914; 26806-138, J. A. G., Feb. 1, 1916; C. M. O. 5, 1916, 7.)

7. **Officers of the National Naval Volunteers may administer oaths**—An officer of the National Naval Volunteers, commanding a vessel of the Navy, may lawfully administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration. (File 19037-64, J. A. G., 7 Sept., 1917; C. M. O. 58, 1917, 12.)
8. **Officers of the Public Health and Marine Hospital Service are not required to take additional oath of allegiance.** *See* PUBLIC HEALTH AND MARINE HOSPITAL SERVICE.

OATH OF ALLEGIANCE.

1. **Administered by notary public at recruiting substation.** (C. M. O. 7, 1921, 18.)
2. **Officers of Public Health and Marine-Hospital Service**—Not required to take further oath than that provided by section 1757, R. S., when rendering service for medical department of the Navy. (C. M. O. 32, 1917, 6.)

OATH OF WITNESS.

Nature of testimony required by—Recommendation having been made to the department that naval courts and boards be so modified as to prescribe that the judge advocate shall read the charges and specifications to each witness before the witness is sworn, because the oath prescribed by law requires that the witness swear that he will state everything within his knowledge in relation to the charges, the department in disapproving the recommendation held that it would be improper and inexpedient to read the charges and specifications to the witnesses. The following is quoted from the decision of the department on the subject:

"The witness is not required to state everything within his knowledge, but only such matters as may be inquired into during the course of his examination. He is under no compulsion to state anything which is not inquired into, and the oath, in effect, merely obligates him to tell the whole truth concerning the matters to which his attention is directed and concerning which he is questioned." (File 12821-170; J. A. G., 8 Nov., 1919; C. M. O. 304, 1919, 17.)

OBJECTION. *See* PROCEDURE.

OFFENSES.

1. **Are the "same offenses" when the evidence which would sustain either one will, without any change or addition whatsoever, also sustain the other.** (McRae *v.* Henkes, U. S. Ct. of Appeals, 8th Circuit, May term, 1921, case not yet reported.) (C. M. O. 8, 1921.)
2. **Degrees of**—Unlawfully having in possession clothing of another is not in the same category as having clothing in the lucky bag. The former is not essentially a military offense, but involves moral turpitude. (C. M. O. 16, 1916, 8.)
3. **Facts and circumstances constituting**—Must be set forth with certainty and precision. (C. M. O. 186, 1919, 26.)
4. **Higher than charged**—Court not empowered to find. (C. M. O. 316, 1919, 4.)

OFFICE.

1. **Contract**—Whatever the form of the statute, the officer under it does not hold by contract. (File 3568-02; 20 J. A. G., 111.)
2. **Vested right.** (File 3568-02; 20 J. A. G. 110.)

OFFICERS.

1. **Active and retired, precedence of.** (C. M. O. 4, 1921, 18.)
2. **Army classification**—The "classification of officers" as established by section 24 (*b*) of the Army reorganization act is not applicable to the Marine Corps. (File 26521-405 : 1, Sec. Navy, 15 Sept., 1920; *see also* File 26521-405, 30 June, 1920; C. M. O. 119, 1920, 18.)
3. **Command by officers of staff corps in line.** (C. M. O. 6, 1921, 11.)
4. **Can not surrender mileage or emoluments.** *See* MILEAGE.
5. **Confinement of officers of the U. S. S. "Chicago" in Venice.** (File 2935-3844-02; 20 J. A. G. 146, 161.)
6. **Court-martial orders**—Officers, particularly those of rank and experience, are presumed to know of the subject matter of court-martial orders and be governed accordingly. (C. M. O. 25, 1916, 2.)

7. **Customs of the service**—Duties imposed on officers by customs of the service. (C. M. O. 27, 1916.)
8. **Detailed to duty involving flying.** (C. M. O. 8, 1921, 17.)
9. **Distribution in the Medical Corps.** *See* MEDICAL CORPS.
10. **Distribution in the Pay Corps.** *See* PAY CORPS.
11. **Effect of pardon as to reentrance into the service**—An officer of the Navy who has been dismissed by sentence of court-martial and subsequently pardoned for the offense for which dismissed, is not eligible for reappointment to the Navy, or to membership in the Fleet Naval Reserve, in view of section 141, Revised Statutes (1), section 21 of the act of 16 February, 1914 (28 Stat. 283, 290), (2); and act of 29 August, 1916 (39 Stat. 589). (File 26282-326: 2, 15 Feb., 1918; C. M. O. 15, 1918, 16.)
12. **Eligibility**—Those holding temporary commissions in the Navy are, until 30 June, 1923, eligible for appointment in the permanent Navy as chief warrant officer, and may then be appointed in the permanent Navy as a commissioned officer. (File 29226-11, J. A. G., 11 Sept., 1920; C. M. O. 119, 1920, 18.)
13. **Excess**—On the completion of the computation required by law for the purpose of fixing the distribution of officers in the permanent grades and ranks of the line and staff corps of the Navy, and there being an excess of officers of certain ranks over that allowed by law: (1) What may be the practical disposition of these excess officers? (2) May the President revoke the commissions of these officers? (3) Is he required to do so? (4) If these permanent commissions were revoked, what would be the status of these officers? *Held*, (1) That the excess officers should be carried as additional numbers in grade until such time as the number is reduced by death, resignations, promotions, retirements, etc., and that no additional promotions should be made to any rank that is already filled to the legal quota or above; (2) That the President is not required or directed by law to revoke the commissions of permanent officers found to be in excess of the number allowed by law as a result of subsequent computations and distributions after they have been legally appointed. (File 26521-400, J. A. G., 19 June, 1920; C. M. O. 101, 1920, 23.)
14. **Having been sentenced to dismissal, it was recommended that he be allowed to reenlist.** *See* REENLISTMENT.
15. **Holding both temporary and permanent rank in the Marine Corps**—Can not legally be promoted to the rank of captain and first lieutenant to fill vacancies which occurred prior to the act of 4 June, 1920, and which were existing vacancies on that date, except in the manner prescribed by the act of June 4, 1920. Moreover, permanent and temporary officers of the Marine Corps, of the rank of captain and below are equally eligible to fill the vacancies in those grades of the permanent Marine Corps which occurred prior to the act of June 4, 1920, and those created by that act. (File 29226-6, J. A. G., 7 Aug., 1920; C. M. O. 115, 1920, 17.)
16. **Ineligible for promotion because of age**—It is not required that officers be retired on June 30, 1920, because of ineligibility for promotion on account of age, where such officers hold temporary commissions in the next higher grades. (C. M. O. 48, 1920, 34.)
17. **In time of war error of judgment does not always demand punishment.** *See* IN TIME OF WAR.
18. **Liability to taxation.** *See* TAX.
19. **Marine.** *See* MARINE CORPS.
20. **Medical Department of the Navy**—Construction of the act of June 4, 1920, as affecting candidates and eligibles for transfer and appointment. (File 15229-20, J. A. G., 9 July, 1920; C. M. O. 101, 1920, 25.)
21. **Named in precept of courts-martial**—It is incumbent upon an officer having official knowledge of his having been named in a precept convening a general court-martial to report to the president of said court for that duty even though he may not have received specific orders so directing. The latter are usually made out by the Bureau of Navigation, Major General Commandant of the Marine Corps or Captain Commandant of the Coast Guard and not by the convening authority. Such are not orders authorizing an officer to sit upon a court, but for him to report to the president thereof for that purpose; the precept or the modification signed by the proper authority convening the court is the document authorizing an officer to take part in the proceedings thereof. (File 28762-1180; C. M. O. 15, 1918, 15.)
22. **Naval reservists may not be employed by firms furnishing supplies to the Government.** *See* NAVAL RESERVE FORCE.
23. **Not conducive to efficiency**—To restrict too closely the performance of duty, especially those of higher ranks. *See* COMMISSIONS.

24. **Promotion.** (C. M. O. 4, 1921, 17.)
25. **Reduction to lower rank**—Too much emphasis can not be laid upon the fact that it is impossible under existing law to reduce commissioned officers from one commissioned rank to another. A commissioned officer can be reduced by sentence of general court-martial to ordinary seaman under article 9 of the Articles for the Government of the Navy, but neither by sentence of court-martial nor otherwise can he be reduced from one commissioned grade to another. The reasons are obvious. Having been lawfully appointed by nomination, confirmation, and commission, to an office of no fixed term, he holds such office until his death, resignation, retirement, or discharge, and the revocation of his commission does not serve to make him an officer in a lower grade, but, on the contrary, is tantamount to discharge from his office and from the Navy. He can not become an officer in a lower grade except by being again nominated, confirmed, and commissioned and by the acceptance of his commission." (File 26521-400, J. A. G., 19 June, 1920; C. M. O. 101, 1921, 24.)
26. **Staff, precedence of.** (C. M. O. 4, 1921, 19.)
27. *See also* PROMOTION; RETIRED OFFICERS; RETIREMENT; SELECTION BOARD.
28. **Sentence**—Of reduction to an enlisted rating can be lawfully inflicted on an officer only for the offense of absence from his command without leave. (G. C. M. Rec. No. 39051; C. M. O. 73, 1918.)
29. **Subsistence**—When traveling under orders. *See* SUBSISTENCE.
30. **Temporary and permanent**—And those who held temporary, permanent, or reserve commissions, are eligible for appointment to the vacancies which occurred in the permanent Marine Corps before, or those created by, the act of June 4, 1921. (File 29226-1, J. A. G., 21 Aug., 1920; C. M. O. 115, 1920, 18.)
31. **Precedence of temporary**—The order in which line officers selected for temporary promotion shall be promoted, or whether they shall be promoted at all, is entirely discretionary. When in fact promoted, their precedence is governed by the dates of their respective temporary commissions and not by their order of precedence in the grade from which promoted, whether their appointments in such lower grade were temporary or permanent. (File 11130-62, J. A. G., 12 Mar., 1919; C. M. O. 114, 1919, 19.)
32. **Temporary and reserve**—Transfer to the regular Navy. The powers of the board. (File 11130-72, J. A. G., 16 July, 1920; C. M. O. 101, 1920, 26.)
33. **They should set an example to an enlisted man**—"It is contrary to the spirit of the day and of the service, for any officer to set the example of drinking and treating, to men who look to officers for leadership and guidance. An officer should set the highest example to the enlisted personnel * * *." (C. M. O. 16, 1917.)

OFFICERS OF THE COAST AND GEODETIC SURVEY, LIGHTHOUSE ESTABLISHMENT, MARINE HOSPITAL AND PUBLIC HEALTH SERVICE.

May not be enrolled as members of the Naval Reserve Force in time of peace. (C. M. O. 7, 1921, 18.)

OFFICERS OF THE NAVAL RESERVE FORCE, FORMER RETIREMENT OF (C. M. O. 7, 1921, 19.)

OFFICERS OF THE NAVY. Civil rights of. *See* CIVIL RIGHTS.

OFFICIAL CALL. *See also* NAVAL AUXILIARY RESERVE VS. REGULAR NAVY.

"OFFICIAL DUTY." *See* JUDICIAL NOTICE.

"ONE OFFICER" BOARD OF INVESTIGATION.

Irregular—While "one officer" boards of investigation have been convened, such action is irregular, since R-316 provides that a board of investigation consists of three officers. *See* BOARDS OF INVESTIGATION.

OPINIONS.

1. **Judge Advocate General**—Renders opinions, not decisions. (C. M. O. 37, 1916, 6.)
2. **Of witnesses, admissibility of.** (C. M. O. 12, 1921, 8.)
3. **Situations must not be created with a view to securing opinions.** *See* INSTRUCTIONS.

ORDERS.

1. **Affecting third persons must be communicated to them.** *See* COMMAND.
2. **Decision by the Secretary of the Navy**—Effect as an order. (C. M. O. 37, 1916, 6.)
3. **Definite and positive.** (C. M. O. 3, 1921, 14.)
4. **Duty of officers having been informed of being named in the precept of court martial.** *See* OFFICERS.

5. **Filing of, on board ship not sufficient to charge ship's company with cognizance thereof**—Testimony that an order is on file on board ship is not sufficient to prove the publication of said order to a member of the said ship's company, or that such member was cognizant or chargeable with cognizance of said order. (G. C. M. Rec. No. 40322; C. M. O. 141, 1918, 25.)

OVERPAYMENT.

Responsibility of pay clerk. *See* PAY CLERK.

PARDON.

1. **By implication**—No such thing known to law. (*See* 31 Op. Atty. Gen. 419; C. M. O. 235, 1919.)
2. **Constructive**—No such thing known to law. (*See* 31 Op. Atty. Gen. 419; C. M. O. 235, 19,19.)
3. **Constructive**—Where accused, after approval by convening authority of sentence involving loss of pay, accepted a higher office, it was held that this promotion was a constructive pardon of an unexecuted sentenee (Naval Digest, p. 445, sec. 44) and resulted in the remission of that portion of the sentence remaining unexecuted at date of promotion. *But see* 31 Op. Atty. Gen. 419. (C. M. O. 141; 235; 1919.)
4. **Constructive or implied.**—Does not exist. (C. M. O. 209, 1919, 24.)
5. **Effect on the question of reentrance in the service.** *See* OFFICERS.
6. **Its effect on the question of reentrance in the service when convicted of desertion.** *See* DESERTION.
7. **Numbers lost by court-martial**—An officer having lost numbers by reason of general court-martial sentence was restored to his original position by the President through a full and unconditional pardon. (File 3568–02, p. 6; 20 J. A. G., 1, 13; *see also* 12 Op. Atty. Gen. 547.)
8. **Promotion as constructive**—The department has formerly held, following the opinions of the Attorney General (6 Op. Atty. Gen. 123; 8 Op. Atty. Gen. 237), that promotion of an officer while under charges for trial by general court-martial is a constructive pardon. However the Attorney General in an opinion dated 4 April, 1919 (26251–18107:4 J. A. G.; 31 Op. Atty. Gen., 419), held that there is no such thing known to law as a constructive pardon or pardon by implication, thereby expressly overruling the earlier opinions of the Attorney General. (C. M. O. 235, 1919.)
9. **Unconditional**—Does not remove disability imposed by section 1441, Revised Statutes. (C. M. O. 209, 1919, 25.)
10. **Constructive**—Plea of constructive pardon in bar of charge of fraudulent enlistment. See FRAUDULENT ENLISTMENT.

PATIENTS.

Power to punish—" * * * when so empowered by the Secretary of the Navy to order summary court-martial, the commanding officer of a naval hospital or hospital ship shall be empowered to order such courts and deck courts, and inflict the punishments which the commander of a naval vessel is authorized by law to inflict, upon all enlisted men of the naval service attached thereto, whether for duty or as patients. (Act of Aug. 29, 1916; C. M. O. 30, 1916, 6.)

PAY.

1. **Acting appointees may receive the pay.** *See* COMMAND, FLEETS AND SQUADRONS.
2. **Checking pay**—Under the provisions of the act of August 29, 1916 (39 Stat. 380). (C. M. O. 33, 1916, 5–6; 41, 1916, 6.)
3. **Continuous service.** *See* FLEET NAVAL RESERVE.
4. **Continuous service pay**—Men discharged from the former Naval Reserve on August 28, 1916, by the passage of the act of August 29, 1916 (39 Stat. 587–592), which legislated the Naval Reserve established by the act of March 3, 1915 (38 Stat. 940–941), out of existence (23 Comp. Dec. 190), are entitled to continuous service pay if they reenlist in the regular Navy before December 28, 1916 (i. e., within four months of their discharge from the Naval Reserve by operation of law), but not to a gratuity of four months' pay. (File 28550–20, J. A. G., Nov. 4, 1916. *See also* File 28550–21:1, Sec. Navy, Nov. 10, 1916; C. M. O. 41, 1916, 7.)
5. **Enlisted man on bail**—An enlisted man of the naval service released from the custody of the civil authorities on bail, who reports at his regular station for duty, is not to be deprived of his pay after so reporting, simply because, due solely to the fact that he was on bail, no naval duty was assigned him. (22 Comp. Dec., 374. File 9663–31; C. M. O. 3, 1916, 8.)
6. **Flying duty.** *See* COMPENSATION.

7. **Increased under the act of May 22, 1917.**—The increase in pay authorized by the act of May 22, 1917, for the enlisted personnel of the Navy, is not to be considered as extra pay within the meaning of Court-Martial Order No. 24, 1909. Such increase is a part of the actual pay for the different ratings and should be included in computing loss of pay both by summary and deck courts. (File 26287-4008, J. A. G., July 2, 1917; C. M. O. 46, 1917, 3.)
8. **Loss of.** *See also* SENTENCE.
9. **Men in debt**—Article R-3669, (3) of the Navy Regulations, 1913, is not construed as authorizing the captain to grant special requisitions for the payment of money to men in debt, and the said regulation is not considered to be affected by ALNAV Message No. 94. (File 26806-131; 54, J. A. G., 14 Dec., 1917; C. M. O. 88, 1917, 17.) *See also* CLOTHING AND SMALL STORES.
10. **Retainer.** *See* NAVAL RESERVE FORCE.
11. **Retired officers**—In reference to that clause of the act of August 29, 1916 (39 Stat. 581), which provides that "Hereafter any retired officer of the naval service who shall be detailed on active duty shall, while so serving, receive the active-duty pay and allowances of the grade, not above that of lieutenant commander in the Navy or of major in the Marine Corps, that he would have attained in due course of promotion if he had remained on the active list for a period beyond the date of his retirement equal to the total amount of time during which he has been detailed on active duty since his retirement." It was held that provided a retired officer meets the other requirements of the law quoted, that said law operates *ex proprio vigore* to confer upon such officer the benefits mentioned, and it is accordingly decided that the issuance of "new orders to active duty" is not necessary to accomplish the purpose of the law. (Op. Atty. Gen. 287; File 27231-77, Sec. Navy, Sept. 19, 1916; C. M. O. 33, 1916, 7.)
12. **Sentence**—Remission of sentence involving a term of confinement together with "accessories" should not be made without remitting the loss of pay in whole or in part. (C. M. O. 3, 1917, 4.)
13. **Time lost by ailment, which may be remedied, and refusal of surgical operation will effect loss of pay.** *See* SURGICAL OPERATION.
14. **Unnaturalized national enlisted in the Navy is not entitled to increased pay provided for citizens.** *See* CITIZENSHIP.
15. **Warrant officers (commissioned)—When certificate of credibility may be canceled**—The opinion quoted in paragraph 114, page 454, Naval Digest, 1916, does not apply to a case where it is subsequently established by additional evidence, unknown to the department at the time the certificate of credibility was issued, that said certificate was clearly erroneous, and in fact the officer's record was not creditable on the date thereof, because of serious offenses previously committed by him, but not reported and proved by general court-martial proceedings until after the issuance of the certificate. In the case noted in Naval Digest, 1916, it was stated that when a certificate of credibility had been issued, "Anything of a discreditable nature thereafter occurring should be disposed of by means of the disciplinary instrumentalities." In this case the offenses can not be regarded as matters "thereafter occurring" within the meaning of the former opinion, and cancellation of the certificate was accordingly authorized. (File 17789-27; 21, J. A. G., 28 Feb., 1919; C. M. O. 77, 1919, 25.)

PAY, ADDITIONAL.

Special duties on receiving pier—An enlisted man of the Navy detailed as tailor on Commonwealth Pier, Boston, Mass., may not receive the extra pay allowed a ship's tailor, under article 4427 (21), Naval Regulations, 1913, and General Order 186, 1905. (File 26806-146, J. A. G., 16 Aug., 1917.) It was then suggested that the above, being Executive orders, might be changed by the President. On being submitted to the Comptroller of the Treasury, it was held that the act of 13 May, 1908, establishing rates of pay for enlisted men, including those establishing rates of additional compensation for the performance of duties such as ship's tailors, gun pointers, etc., made said provisions statutory, so that neither the rates of compensation nor the conditions under which the compensation may be paid can now be altered by Executive orders. (File 26806-146:1, J. A. G., 7 Jan., 1918; C. M. O. 4, 1918, 18.)

PAY CLERKS, ACTING.

Composition of the examining boards under provisions of 38 Stat. 943—The act of March 3, 1915 (38 Stat. 943), requires that boards for the examination of candidates for appointment as acting pay clerks, under its provisions be composed of officers of the Pay Corps when practicable. Consequently such boards may not be composed of other officers when pay officers are available. (File 26521–188, J. A. G., Mar. 26, 1917, 7; C. M. O. 22, 1917, 3.)

PAY CLERKS.

1. *See also* ACTING PAY CLERK.
2. **Duty independent of paymasters**—The act of June 12, 1916, authorizing officers and enlisted men of the Navy and Marine Corps to serve under the Government of Haiti, is construed as authorizing the detail of such chief pay clerks, pay clerks, and acting pay clerks to assist the Republic of Haiti as may be mutually agreed upon by the President of the United States and the President of the Republic of Haiti, notwithstanding that such clerks may, under such detail, be in the performance of duty independent of pay officers. (File 5460–84, J. A. G., Aug. 16, 1916; C. M. O. 30, 1916, 8.)
3. **Responsibility for overpayment**—It has been held that a pay clerk can not be held responsible for his error in the pay-roll composition whereby an overpayment on discharge takes place, to the extent of a checkage of his own account in the amount so overpaid. The disbursing officer carrying the account is responsible for the same and can not shift such responsibility to a subordinate. (File 5460–89, Sec. Navy, Mar. 26, 1917; C. M. O. 22, 1917, 10.)

PAY CLERKS AND CHIEF PAY CLERKS.

Haiti—Pay clerks and chief pay clerks may be detailed to duty in Haiti independent of pay officers. (C. M. O. 30, 1916, 8.)

PAY, COMPULSORY ALLOTMENT.

May not be forfeited by sentence of court-martial—It is the opinion of the Bureau of War Risk Insurance that that portion of pay of enlisted men which is, by compulsory allotment under the amendatory act of October 6, 1917, set aside for members of class A, is beyond the power of courts-martial to forfeit, and that the compulsory allotment shall continue to be paid notwithstanding that the enlisted man has been sentenced by court-martial to forfeit all his pay for a specified period. (File 28909–64:1; C. M. O. 4, 1918, 18.)

PAY CORPS.

Distribution of officers in various grades—The act of 29 August, 1916, provides that the total authorized number of commissioned officers of the active list of the Pay Corps, exclusive of commissioned warrant officers, shall be 12 per cent of the total number of commissioned officers of the active list of the line of the Navy; and the distribution among the various grades of the Pay Corps shall be as follows: "One-half pay directors with the rank of rear admiral to four pay directors with the rank of captain, to eight pay inspectors with the rank of commander, to eighty-seven and one-half in the grades below inspector." It will be noted that no provision is made in the above for distribution below the grade of pay inspector (rank of commander). It would appear that this provision of the act of 29 August, 1916, should receive the same construction as similar provisions in previous acts (26 Op. Atty. Gen. 511), and that the distribution of the increase among the grades below pay inspector has been left to executive discretion. The Judge Advocate General was, therefore, of the opinion that 87½ per cent of the increase in the commissioned personnel of the Pay Corps may be distributed among the three lower grades in such proportions as may in the opinion of the Secretary of the Navy best serve the interests of the service, there being a minimum requirement of 40 pay officers of the grade of assistant paymaster when the three lower grades are full, this requirement being imposed by the act of 3 March, 1899. (File 27223–37, J. A. G., 20 Mar., 1918; C. M. O. 30, 1918, 30.)

PAY OF PUBLIC OFFICERS.

1. **Opinions of the Attorney General should be followed**—The opinion of the Attorney General that the pay of a public officer can not be withheld on account of an unadjudicated cross claim against him by the United States should be followed by the auditor and disbursing officer notwithstanding a contrary decision rendered by the Comptroller of the Treasury in the same case. (C. M. O. 50, 1918, 20.)

2. **Comptroller of the Treasury has no jurisdiction in adjudicated cross claim**—The Comptroller of the Treasury has no jurisdiction to render a decision concerning the authority of a disbursing officer to withhold any portion of a public officer's statutory salary on account of an unadjudicated cross claim against him by the Government; and a decision of the Comptroller of the Treasury in such a case is extra-official and not required by law. (C. M. O. 50, 1918, 20.)
3. **Can not lawfully be withheld**—Pay of public officers can not lawfully be withheld on account of an unadjudicated cross claim against them by the United States; where this is done the civil courts may order payment of salary in mandamus proceedings, regardless of the alleged indebtedness, and the officers concerned are not required to bring suit in the Court of Claims. (File 22465–11; C. M. O. 50, 1918, 20.)
4. **Nothing justifies disbursing officer in exercising espionage**—Neither the law nor propriety justifies an auditor or disbursing officer in attempting to exercise espionage or petty supervision over the time, services, and whereabouts of a public officer and to "dock" his pay for an alleged absence from duty in excess of the specified leave of absence authorized by law, particularly where the head of the department has advised that the officer's explanation was entirely satisfactory. (C. M. O. 50, 1918, 20.)

PAY ROLL.

1. **False entries on rough pay roll**—The rough pay roll is the *pay roll* up to the end of the quarter, when what is known as the smooth pay roll is prepared for forwarding to the auditor. Therefore, false and fraudulent entries upon the *rough pay roll* are false and fraudulent entries upon the *pay roll*. (G. C. M. Rec. No. 35289; C. M. O. 73, 1917.)
2. **The rough pay roll is the same as the smooth pay roll, when the offense of embezzlement is involved.** *See* EMBEZZLEMENT.

PENSION.

1. **Authority of the Secretary of the Navy**—Section 4756, Revised Statutes, as amended by the act of December 23, 1886, provides: "There shall be paid out of the naval pension funds, to every person who, from age or infirmity, is disabled from sea service, but who has served as an enlisted man or as an appointed petty officer or both in the Navy or Marine Corps for the period of twenty years, and not been discharged for misconduct, in lieu of being provided with a home in the naval asylum, Philadelphia, if he so elects, a sum equal to one-half the pay of his rating at the time he was discharged, to be paid to him quarterly, under the direction of the Commissioner of Pensions; and application for such pension should be made to the Secretary of the Navy, who, upon being satisfied that the applicant comes within the provisions of this section, shall certify the same to the Commissioner of Pensions and such certificate shall be his warrant for making payment as therein authorized."

   The above-quoted section authorizes the Secretary of the Navy to determine whether an applicant is entitled to the payment therein referred to. The Commissioner of Pensions in making such payment acts only in a ministerial capacity and is in no way responsible for the correctness of such rulings. (31 Op. Atty. Gen. 127; C. M. O. 46, 1917, 23.)
2. **Authority of the Secretary of the Navy over, in accordance with section 4756, Revised Statutes**—This section authorizes the Secretary of the Navy to determine whether an applicant is entitled to payments therein referred to; the Commissioner of Pensions in making such payments acts only in a ministerial capacity and is in no way responsible for the correctness of such rulings. (Op. Atty. Gen. 12, June, 1917; C. M. O. 46, 1917, 24.)
3. **Navy service, under section 4757, Revised Statutes**—An enlisted man who has had 11 years creditable service prior to the enlistment from which he was discharged for bad conduct, and who has completed an enlistment for four years and received an honorable discharge therefrom since the date of his bad-conduct discharge, may lawfully be granted the relief provided by section 4757, Revised Statutes. (File 28550–123, J. A. G., 16 Aug., 1917; C. M. O. 53, 1917, 13.)
4. **Effect of enrollment of a widow in United States Naval Reserve Force**—The fact that one is drawing a widow's pension is no obstacle to the completion of her enrollment in the Naval Reserve Force. Whether, if so enrolled, she would be entitled to continue drawing her pension is a question for decision by the Pension Office, involving an interpretation of section 4724, Revised Statutes, as modified by the act of 3 March, 1891 (26 Stat. 1082), concerning payment of pensions to persons in the Army, Navy, or Marine Corps. (File 28550–280, J. A. G., 7 Mar., 1918; C. M. O. 30, 1918, 32.)

5. **Effect of section 312, War risk insurance act, upon section 4756, Revised Statutes**—The Acting Attorney General, in an opinion rendered to the Secretary of the Navy on 28 May, 1918, stated that payments under section 4756, Revised Statutes, were no longer applicable since the passage of the war risk insurance act, except insofar as rights under the law had accrued on 6 October, 1917, the date of the passage of the act; and that one who had become entitled to allowances under section 4756, Revised Statutes, in all respects, except that he had not actually received his discharge from the service prior to 6 October, 1917, was entitled to the benefits of section 4756, as having accrued rights thereto, So that a first sergeant in the Marine Corps who had served in said corps for more than 21 years prior to 6 October, 1917, and had "become disabled from sea service" by a wound received in action in June, 1916, but who was not discharged until 5 November, 1917, when he was discharged by medical survey, his character being excellent, was held to be entitled to the benefits provided by section 4756, Revised Statutes. And, further, the said first sergeant was entitled both to the benefits of section 4756, Revised Statutes, and to whatever allowances he may be otherwise entitled under the provisions of the war risk insurance act (act of 6 Oct., 1917). Payments under section 4756, Revised Statutes, would not commence to run until actual discharge. (Act of 3 Mar., 1891, 26 Stat. 1082.) (File 26510–1366:2 and 3; C. M. O. 50, 1918, 28.)
6. **Jurisdiction of the Secretaries of the Navy and Interior.** *See* ATTORNEY GENERAL.
7. **"Money benefits"**—Distinguished from pensions. (*See* R. S. 4756; File 26510–1022:4, J. A. G., December, 1916; 25 Op. Atty. Gen. 85; 19 Comp. Dec. 723; File 26510–1022:1.)
8. **Opinion of the Attorney General**—Can allowances under section 4756, Revised Statutes, or section 4757, Revised Statutes, and a pension under general pension laws both be paid in view of section 4715, Revised Statutes?

   Should allowances granted by the Secretary of the Navy under section 4757, Revised Statutes, to persons who are inmates of the Naval Home be paid as at present directly to the beneficiaries (as not being within the purview of section 4813, Revised Statutes) or should they be paid, pursuant to section 4813 and the act of June 30, 1914, to the governor of the Naval Home for the use of the grantees?

   The conclusions of the Attorney General, sustaining the views of the Judge Advocate General upon the above questions, were recapitulated in his opinion as follows:

   "1. That the money benefits provided for in section 4756 are within the purview of the word 'pension' in section 4813, that they are also within the purview of the word 'pensions' in the pertinent provision of the naval appropriation act of June 30, 1914 (38 Stat. 392, 398), and in view of that act inure to the grantees concurrently with maintenance in the Naval Home.

   "2. That allowances under section 4756 and 4757 do not fall within the prohibition of section 4715 and may therefore be paid in addition to a pension under general pension laws.

   "3. That allowances under section 4757 are 'pensions' within the meaning of section 4813, Revised Statutes, and the act of June 30, 1914, above referred to, and should therefore be disposed of, in cases where the beneficiaries are inmates of the Naval Home, in the manner prescribed by that act." (C. M. O. 37, 1918, 23.)
9. *See also* LIGHTHOUSE VESSELS.
10. **Under Section 4757, Revised Statutes**—An enlisted man who has had 11 years' creditable service prior to the enlistment from which he was discharged for bad conduct and who has completed an enlistment of four years, and received an honorable discharge therefrom since the date of his bad-conduct discharge, may lawfully be granted the relief provided by section 4757, Revised Statutes. (File 26510–1347, J. A. G., 11 Aug., 1917; C. M. O. 53, 1917, 13.)

PERJURY.

1. **Acts which constitute the offense**—Testimony on which a charge of perjury is based must have been material to the issue. Where the facts sworn to are wholly foreign to the purpose and altogether immaterial to the matter in question, the oath does not amount to perjury (Bouvier's Law Dictionary, vol. 3, p. 2567). Irrelevant testimony, although false, can not be made the basis of a perjury charge; nor will a false oath to superfluous and immaterial matter sustain an indictment for the offense. (30 Cyc., p. 1418.) (File 26262–3795; C. M. O. 4, 1918, 17; File 26262–4434 C. M. O. 71, 1918.)
2. **Gist of the offense**—There are two elements essential to the completion of this offense, namely, (1) falsity of the testimony in question, and (2) knowledge of such falsity together with an intention to deceive. (C. M. O. 17, 1916, 8.)

3. **How committed**—A witness may commit perjury by testifying that he knows a thing to be true when, in fact he either knows nothing about it or is not sure about it, and this is true whether the thing is true or false in fact. (C. M. O. 212, 1919, 2.)
4. **How committed**—As to the manner in which the accused has perjured himself; this is a question of fact for the court. (C. M. O. 212, 1919, 2.)
5. In order for criminality to attach in a trial for perjury it is necessary that the prosecution show that the accused has wilfully and corruptly given upon lawful oath in a judicial proceeding, false testimony material to the issue. (C. M. O. 212, 1919.)
6. It has been held that perjury has been committed when a witness swears that he does not remember certain facts when he actually does remember them. (C. M. O. 212, 1919, 2.)
7. **Involuntary testimony of an accused against himself will not support the charge of perjury**—An accused was tried by general court-martial and convicted of perjury. The offense was based on evidence given by the accused before a deck court in which also he was the accused. The evidence before the general court-martial disclosed the fact that the accused prior to testifying before the deck court, had not been informed that it was voluntary with him as to whether or not he became a witness. *Held*, That if he did not know his rights and was guilty of the charge on which he was being tried, he was put in the position where he must either give false testimony or help to convict himself. In the opinion of the Judge Advocate General, it is improper to hold that testimony given under such circumstances will support a charge of perjury. (26251-25640, 22 Dec., 1920; G. C. M. Rec. No. 50949; C. M. O. 151, 1920, 15.)
8. **Limitation of punishment during war**—Under article 22 of the Articles for the Government of the Navy, which provides that "all offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court-martial may direct," perjury may be punished without limitation, during the period of the war; with the exception, of course, of the general limitation contained in article 50 of the Articles for the Government of the Navy. (File 26206-151, Sec. Navy, 14 Jan., 1918; C. M. O. 4, 1918, 19.)
9. **Proper form of allegation.** *See* CHARGES AND SPECIFICATIONS

PERJURY SYNONYMOUS WITH FALSE SWEARING. *See* FALSE SWEARING.

PERMANENT APPOINTMENT.

Eligibility of temporary chaplains for. (C. M. O. 8, 1921, 16.)

PERMANENT COMMISSION.

Officer—Holding temporary appointment does not lose rank on receiving permanent commission. (C. M. O. 72, 1917, 20.)

PHOTOGRAPHER.

Photographing naval reservation. *See* ARREST.

PHYSICAL DISABILITY.

Waiver on examination for promotion is not lawful—Under section 1493, Revised Statutes, waiver of physical disability of an officer of the Navy upon examination for promotion is not authorized by law. If, in the opinion of the board of medical examiners, disability of an officer so examined does not disqualify him for the performance of all his duties in the next higher grade at sea, it is competent for the board so to find, and the candidate may then be recommended for promotion. (File 26260-4294, Sec. Navy, 22 Feb., 1917; C. M. O. 22, 1917, 10.)

PILOT.

"The proper place for the captain of a ship in pilot waters is on the bridge. The captain is at all times responsible for safe navigation whether a pilot is on board or not. In this case it is probable that if the captain had been on the bridge more judicious action might have been taken * * *." (C. M. O. 98, 1919, 2.)

"Guilty" having been pleaded, only evidence in extenuation or of previous good character may be introduced. *See* EVIDENCE; *also* N. C. B., 1917.

Must be personal act of the accused—"A plea by an attorney of a party indicted for a felony is a nullity; the defendant must plead in person." (Wharton on Criminal Law, 7th ed., par. 530) (C. M. O. 30, 1918, 22.)

3. **Must be personal act of accused**—"A plea confessing himself to be guilty of crime should not be entered except with the express consent of the defendant given by him personally in direct terms in open court. Nothing should be left to implication, and his confession of guilt should be explicitly made by himself in person in the presence of the court." (People *v* .McCrory, 41 Cal. 458.) (C. M. O. 30, 1918, 22.)
4. **Must be personal act of the accused**—"A personal appearance and plea in person are necessary at the arraignment: this can not be by attorney. The only exception to this rule is that in a misdemeanor punishable only by fine without imprisonment and for special cause shown, and as a favor to the defendant, he will be permitted to plead by attorney." (Bishop's New Criminal Procedure, vol. I, sec. 268.) (C. M. O. 30, 1918, 22.)
5. **Of accused, improper.** (C. M. O. 12, 1921, 11.)
6. **Withdrawal and substitution**—A counsel for an accused requested permission of a court to withdraw the accused's plea of "not guilty" and to substitute therefor a plea of "guilty." The record disclosed that the court announced that the request of the accused was granted, and that he was allowed to enter a plea of "guilty." *Held*, That when the request for withdrawal of a plea and substitution of another is made by counsel, it is necessary that the record clearly indicate that the consent of the accused was given to the action taken by his counsel, and that it was his personal desire to substitute some other plea for that originally made on the arraignment. Where the substituted plea is that of "guilty" the record should show that the accused was duly warned as to the effect of such substituted plea. (File 26251–16806; G. C. M. Rec. No. 37337; C. M. O. 30, 1918, 22.)
7. *See also* ADMISSIONS.

PLEADING.

All material facts, essential elements and circumstances—Embraced in the definition of offense must be stated and if any essential element of crime is omitted, it can not be supplied by intendment or implication. The court is not warranted in taking judicial notice of the existence of any essential elements unless set forth. (C. M. O. 36, 1920, 3.)

PLEA IN BAR.

Fraudulent enlistment—An accused pleaded in bar of trial on a charge of fraudulent enlistment, former jeopardy and constructive pardon, in that the department with full knowledge of his offense, had placed him on probation for a period of one year. The court ruled that the pleas were valid and so informed the department. *Held*, That the ruling was erroneous. (*See* FRAUDULENT ENLISTMENT.) It was directed that if upon reconsideration of its action on the pleas in bar, it decided that said pleas were invalid, the judge advocate should enter a nolle prosequi on the charge of fraudulent enlistment. The fact being recognized that as the offense of fraudulent enlistment was knowingly passed over by the department, it should not, under the circumstances, be brought into question. (File 26251–15021; 5 Sec. Nav., 2 Apr., 1918; G. C. M. Rec. No. 37874; C. M. O. 37, 1918, 17.)

PLEA OF ACCUSED.

Procedure upon improper. (C. M. O. 9, 1921, 11.)

PLEA OF GUILTY.

1. **Inconsistent with testimony**—Plea of guilty not inconsistent with testimony of accused that he did not profit financially. (C. M. O. 78, 1917, 4.)
2. **Judicial confession**—A plea of guilty is a judicial confession and dispenses with evidence to prove the facts set forth in a specification. To a lesser extent an admission in open court of any material fact set forth in a specification, when such admission is voluntarily made by the accused or by his counsel in his presence and with his express or implied authority, is a judicial confession of such fact and dispenses with the necessity of evidence to establish same. (File 26251–12159.)

PLEDGE.

Military equipment. *See* MILITARY EQUIPMENT.

POLICY.

Reconsideration of Comptroller's decisions. *See* COMPTROLLER OF THE TREASURY.

POLICY OF DEPARTMENT.

1. **Contrary to**—Multiplicity of charges covering same offense where no aggravating circumstances to distinguish one from other. (C. M. O. 175, 1919.)
2. **Public reprimand not in accordance with.** (C. M. O. 313, 1919.)

POSSESSION.

Distinguished from custody—Where a bandsman, who had been authorized to take home a violin, the property of the United States, but he pawned it, *Held*, that he took it from the constructive possession of the Government and committed a trespass in so doing, and was guilty of larceny and not embezzlement. (File 26251–24279, J. A. G., 29 July, 1920; G. C. M. Rec. No. 48851; C. M. O. 101, 1920, 14.)

POSTMASTERS.

Securing recruits. *See* RECRUITS.

PRECEDENCE.

1. *See also* APPOINTMENTS, TEMPORARY.
2. **Acting appointees are entitled to such rank and precedence.** *See* COMMAND, FLEETS AND SQUADRONS.
3. **Active and retired officers at official functions.** (C. M. O. 4, 1921, 18.)
4. **Affected by loss of numbers.** *See* LOSS OF NUMBERS.
5. **And rank—Temporary and permanent commissions**—Where an officer was given a temporary commission as commander, dated 31 August, 1917, and a permanent commission as commander, dated 1 July, 1918, and later given a temporary commission as captain, *Held*, such officer no longer takes rank and precedence under either commission he receives in the grade of commander, but takes rank and precedence only according to his temporary commission as captain.

   In the case of an officer, while serving in the grade in which he held two commissions, one temporary and one permanent—as long as the temporary appointment remains in force and was not expressly revoked or terminated by operation of law—such an officer would take rank from the date of the temporary commission and would not fall behind officers who later attained such rank. This must not be understood as meaning that his permanent commission should be given the same date as his temporary commission, as such permanent commission could not be given a date earlier than that on which the permanent vacancy occurred. (File 11130–47:1, Sec. Nav., 18 July, 1919; C. M. O. 237, 1919, 28.)
6. **Brigadier generals and rear admirals**—Rear admirals take precedence over brigadier generals by virtue of rank which is one grade higher. The war-risk insurance amendment of October 6, 1917, is ineffective to change the relative positions of these ranks. (C. M. O. 35, 1920, 21.)
7. **Changing date of commission**—A change of date of commission can be legally accomplished by a new nomination and confirmation made for the express purpose of correcting the date of rank. If confirmed by the Senate a new commission can be issued. (File 28687–30, J. A. G., 11 Oct., 1920; C. M. O. 127, 1920, 14.)
8. **Coast Guard**—The precedence between officers of the Navy and of the Coast Guard, of corresponding grade, is determined by the dates of their respective commissions in those grades. (File 28762–115:1, J. A. G., 29 Aug., 1917; C. M. O. 53, 1917, 12.)
9. **Ensigns of the regular Navy and the Naval Reserve Force**—There being no statutory provisions covering the question of precedence with relation to each other of commissioned or warrant officers of the regular Navy and ensigns of the United States Naval Reserve Force, and it having been held by the Attorney General (23 Op. Atty. Gen. 156, 160) that the Secretary of the Navy may determine such a question by virtue of his general authority under the President, to make rules and regulations for the government of the Navy, it is held that the rank and precedence of the officers hereinafter set forth are as indicated, viz: (1) Ensigns, United States Navy; (2) commissioned warrant officers, United States Navy; (3) ensigns, Naval Reserve Force; (4) commissioned warrant officers, United States Naval Reserve Force. (File 11130–90, Sec. Navy, 23 June, 1917; C. M. O. 37, 1917, 13.).
10. **Major generals and rear admirals**—There is no distinction among rear admirals with regard to rank except such as flows from the fact that some commissions are of earlier date than others. There is no distinction between rear admirals of the upper half and rear admirals of the lower half with regard to rank. All are rear admirals and all rank with major generals of the Army and Marine Corps according to their respective dates of commission. The division between the upper and lower half of rear admirals is one for pay purposes only. (C. M. O. 60, 1920, 19.)
11. **Navy and Naval Reserve Force**—It is held that an ensign (temporary) of the United States Navy is senior to an ensign of the United States Naval Reserve Force. (File 11130–40:3, J. A. G., 23 Feb., 1918; C. M. O. 15, 1918, 19.)

12. **Of officers, temporary and permanent.**—It is the opinion of the Judge Advocate General that permanent officers do not take precedence over temporary officers of the same rank merely by reason of the fact that they hold a permanent commission, but that precedence between permanent and temporary officers of the same rank is determined by the dates of their respective commissions. (File 11130–60, J. A. G., 6 Nov., 1918; C. M. O. 174, 1918, 27.)

13. **Officers of the line and staff—Date of commission governs**—Lieutenant "A" was commissioned a lieutenant (junior grade) in the Construction Corps, 1 July, 1917, and lieutenant (temporary) 1 February, 1918.

Lieutenant "B" was commissioned an ensign in the line, 1 July, 1917, and a lieutenant (temporary) 1 July, 1918.

On the above state of facts decision was requested on the question of precedence between the two officers interested.

In an opinion rendered by the Judge Advocate General 24 April, 1919 (File No. 22724–40), it was held that—

"Section 1485, Revised Statutes, in so far as it provided that officers of the staff corps should take precedence with officers of the line and other staff corps by length of service, is absolutely and irreconcilably repugnant to the provision in the act of 29 August, 1916, that officers shall take precedence in each staff corps according to date of commission. Both laws can not stand. If staff officers are to take precedence with each other in the same corps according to date of commission, they can not take precedence with the line and other staff corps according to length of service. If, on the other hand, the length of service rule is to be retained and applied in determining the precedence of staff officers of the line and other staff corps, then the date-of-commission rule for determining precedence of officers in each staff corps must give way and the act of 29 August, 1916, is rendered nugatory. In a case of this kind, where it is impossible to harmonize the provisions of two statutes, the rule is settled that the later statute operates of necessity as an implied repeal of the earlier.

"It is, therefore, my conclusion that the act of 29 August, 1916, hereinbefore quoted, repeals by necessary implication section 1485 of the Revised Statutes, and that officers of the staff corps must now take precedence in each staff corps, and with officers of the line and other staff corps, as well as with officers of the Army and Marine Corps, according to date of commission and in no case by length of service."

Applying the foregoing opinion to the above state of facts, the Judge Advocate General was of opinion that Lieutenant "A" takes precedence over Lieutenant "B." (File 11130–63, J. A. G., 23 Sept., 1919; C. M. O. 280, 1919, 19.)

14. **Officers of the line and staff**—On reconsideration the Judge Advocate General affirmed the opinion digested in C. M. O. 280, 1919, page 19, holding that section 1485 of the Revised Statutes, under which officers of the line and staff when of the same rank took precedence with each other according to length of service, has been repealed by the act of 29 August, 1916, and that officers whose cases would otherwise be governed by said section now take precedence according to date of commission. The Secretary of the Navy approved the Judge Advocate General's opinion to this effect. (File 11130–63: 1, J. A. G., and Sec. Nav., 16 Mar., 1920; *see also* 11130–67, J. A. G. and Sec. Nav., 26 Apr., 1920; C. M. O. 74, 1920, 16.)

15. **Order of, date from temporary or permanent commission**—An officer of the Navy appointed ensign (temporary) in August, 1917, and commissioned as a permanent ensign 16 August, 1918, raised the question as to whether his permanent commission as ensign should not date from the time of his original appointment as temporary ensign. The department held that officers originally appointed to a temporary office in the Navy, under provision of the act of 22 May, 1917, and later commissioned in the same rank or grade take precedence from the date of their permanent commissions and not from the date of their temporary commissions; that on receipt of a permanent commission in the Navy the temporary commission issued to such officers becomes null and void and is superseded by the permanent commission of the later date. The opinion in C. M. O. 72, 1917, page 20, is applicable only to officers of the permanent Navy who have received a temporary promotion and who later received a permanent commission in the same rank or grade. (File 11130–37: 4, 12 Mar., 1918; 28687–27, 20 Jan., 1920; C. M. O. 35, 1920, 22.)

16. **Practice of dating a promotion from date of vacancy**—The custom of giving officers rank from the dates of the vacancies they are promoted to fill is one of long standing in all branches of the service and has received the approval of Congress in various enactments, either expressly or by implication. Nevertheless, where the filling of vacancies is discretionary with the President, the commissions need not be made to date from the occurrence of the vacancy unless the appointing power so decides. (File 26687-7, J. A. G., Oct. 7, 1916; file 26687-30, J. A. G., 11 Oct., 1920; C. M. O. 127, 1920, 14.)
17. **Staff officers.** (C. M. O. 4, 1921, 19.)
18. **Staff officers of the regular Navy and Naval Reserve Force.** *See* STAFF OFFICERS.

PRECEDENT.

1. **Deliberately disregarded.** *See* COURT.
2. **Undesirable**—The department called attention to certain irregularities "not because it appears that * * * has suffered any injustice, but in order that a recurrence of the irregularities noted herein may be prevented." (C. M. O 45, 1916, 2.)

PRECEPT.

1. **Modification**—Two letters which were used as modifications of a precept and were predixed as exhibits, were orders to individuals, relieving one and appointing the other a member of the court. These letters were supplementary orders and are not considered as modifications of the precept. The letters are addressed to the president of the court and should not be confused with orders directing officers to perform the duties set forth in the precept. (Naval Courts and Boards, 1917, sec. 228; C. M. O. 23, 1918, 4.)
2. **Naval examining board**—Changes in. *See* NAVAL EXAMINING BOARDS.
3. **Not proper to designate counsel to assist judge advocate as assistant judge advocate**—There is no such officer of a general court-martial as "assistant judge advocate." Naval Courts and Boards, 1917, section 260–262, provide for the detail of counsel to assist the judge advocate, but such counsel has no standing before the court except in the capacity of counsel. (File 26262-5215, G. C. M. Rec. No. 40447; C. M. O. 174, 1918, 16.)

PRECEPT SHOWS JURISDICTION.

1. **Essential that copy thereof be attached to record.** (File 26262-4894, G. C. M. Rec. No. 39598; C. M. O. 114, 1918, 27.)
2. **Should antedate order directing trial.** (File 26262-4753, G. C. M. Rec. No. 39225; C. M. O. 114, 1918, 27.)

PRESIDENT OF THE UNITED STATES.

1. **Appointing power**—No restrictions upon. *See* APPOINTING POWER.
2. **Loss of numbers**—The President by means of a full and unconditional pardon may restore numbers lost by reason of an executed court-martial sentence. *See* PARDONS.
3. **Respective powers of Congress and the President.** *See* APPOINTING POWER.

PRESUMPTION.

Definition of—A presumption (rebuttable) is defined as "A rule of law that courts and judges shall draw a particular inference from a particular fact, unless and until the truth of such inference is disproved." (C. M. O. 304, 1919, 15.)

PREVENTABLE DISEASE.

Typhoid—Is a preventable disease. (C. M. O. 16, 1916, 9.)

PREVIOUS CONVICTION.

Notation as to—Should be set forth in record of proceedings of court-martial; required by section 320, Naval Courts and Boards. (C. M. O. 2, 1919.)

PRIMA FACIE.

Prima facie case—The testimony of one witness for the prosecution, if worthy of belief, is sufficient to establish a prima facie case for the prosecution, which if not rebutted by the accused will sustain a conviction. (C. M. O. 9, 1916, 6.)

PRINCIPAL. *See* ACCESSORY.

PRINCIPAL AND ACCESSORY.

1. "One who with felonious intent procures a taking of another's property by means of an innocent agent is himself guilty of the larceny as principal * * * But if he procures the taking through a guilty agent he is not a principal but an accessory before the fact." (25 Cyc. 58.) (C. M. O. 169, 1918, G. C. M. Rec. No. 40288.)
2. **Distinction between.** (C. M. O. 7, 1921, 13.)

PRIOR ENLISTMENT.
Jurisdiction over offenses committed in. (C. M. O. 12, 1921, 11.)

PRISON.
Crowded condition—Prisoners were released and restored to duty on account of the crowded condition of the prison and their excellent conduct. (File 4069–02; 20 J. A. G. 175.)

PRISONERS.
1. **Punishment to be administered for escape.** *See* ESCAPE.
2. *See also* PROPERTY.
3. **Deceased—Furnishing national flag to next of kin**—A flag used to drape the coffin of a deceased enlisted man who was a prisoner at the time of his death, may, in the discretion of the Secretary of the Navy, be given to the next of kin of the accused, provided such prisoner's death occurs while he is in the service of the United States Navy or Marine Corps. (File 3768–673: 1, J. A. G., 24 Mar., 1919; C. M. O. No. 114, 1919, 19.)
4. **Unreasonable search**—Naval prisoners in naval prisons are entitled to be secure in their papers (letters) from unreasonable search and seizures. (Art. 68, Manual for the Government of U. S. Naval Prisons; C. M. O. 48, 1920, 12.)

PRISONERS OF WAR. *See also* LIGHTHOUSE VESSELS.

PRIVILEGE.
1. *See also* JUSTIFIABLE CAUSE.
2. **Does not extend to communication with attorneys in fact**—An accused charged with libeling his superior officer admitted authorship of the letter. But objected to the introduction of the letter into evidence on the ground that it was privileged, having been written by him to his father who was his attorney in fact, who later communicated it to counsel for the accused who in turn communicated it to the department.

   Held, That even though the letter had otherwise been privileged, it would have lost that character the moment that the accused by counsel in open court formally admitted authorship thereof, thus himself divulging the full contents of the letter.

   Held further, said letter never was privileged because of its illegal nature, which excluded it from privilege no matter to whom addressed. Moreover it was addressed to an attorney in fact, not an attorney at law, and letters of that class do not come within the category of privileged communications. This is also true of letters to members of the writer's family. (C. M. O. 5, 1917, 3.)
3. **Wife.** *See* WIFE.
4. **Witness**—The mere general assertion of privilege is not sufficient. The witness must claim his privilege to each specific question. (C. M. O. 212, 1919.)

PRIZE AND BOUNTY. (File 4853–02; 20 J. A. G. 279.)

PROBATION.
1. **Men so situated may be tried by court-martial**—An action restoring a man to duty on probation with the possibility of his returning to prison to serve the unexecuted part of his sentence or his summary discharge, or both, hanging over him, does not preclude the man's trial by court-martial for an offense committed while on probation, in case such appears to be preferable. (See in this connection C. M. O. 46, 1917, 24.) (C. M. O. 67, 1917, 19.)
2. **Modified form**—The department believing that a salutory effect on discipline would be produced if, in some cases the confinement were held in abeyance while a man was on probation, instead of being remitted, modified the form to be used as an alternative to that prescribed in General Order No. 110. It declared, however, that this form was not to be used in cases of men convicted of desertion in time of war, as those can not lawfully be restored to duty, nor does the use of this form preclude the man's subsequent trial by general court-martial while on probation. (File 26267–120:1, Sec. Navy, July 31, 1917; C. M. O. 46, 1917, 24.)
3. **Recommendation**—That officer sentenced to dismissal be placed on, in view of his thoroughly efficient services, his exemplary character both as an enlisted man and an officer, and for the reason that should accused be dismissed the Navy would lose a very valuable officer. (C. M. O. 91, 1919.)

PROBATIONARY COMMISSIONS. *See* APPOINTMENTS.

PROBATIONERS.

Legality of discharge and transfer of, to inactive duty—The discharge of an enlisted man of the Marine Corps in the status of a court-martial probationer effected upon competent orders, would, in the opinion of the Judge Advocate General, be legal.

Similarly an enrolled member of the Marine Corps Reserve, while in the status of a court-martial probationer, may legally, upon competent orders, be transferred from the active to the inactive list of the Naval Reserve Force. (File 28553—15, J. A. G., 23 Jan., 1919; C. M. O. 39, 1919, 22.)

PROCEDURE.

1. **Charges and specifications**—Letter transmitting charges and specifications should be dated subsequent to precept. (C. M. O. 211, 1919.)
2. **Civil courts of Virgin Islands.** *See* VIRGIN ISLANDS.
3. **Compulsory attendance of witnesses.** *See* COURTS-MARTIAL.
4. **Erasures**—A department telegram relieving one judge advocate and appointing another merely designates the latter to act in the capacity named. It is a modification of the precept, but does not carry with it any authority to make an erasure and substitution in the original document. (C. M. O. 82, 1917, 3.)
5. **Precept**—Irregular, though not sufficiently so to invalidate. Dating precept subsequent to letter transmitting charges and specifications. (C. M. O. 211, 1919.)
6. **Previous testimony must be read and verified before new or absent members**—When the court met on the second day of the trial a member who had been absent on the first day was duly sworn, the record of the preceding day was read and approved and the trial continued without the witnesses who had previously testified being recalled and having their testimony read and verified as required by Naval Courts and Boards, 1917, section 246. *Held*, the error was fatal. (C. M. O. 84, 1917.)
7. **Recording of objection**—It is proper briefly to set forth in the record the reasons for the objection to the admission of evidence, but not the arguments thereon. (Naval Courts and Boards, 1917, sec. 317; C. M. O. 87, 1917, 3.)
8. **Remission of sentence**—When convening authority, after approval of proceedings, findings, and sentence, then remitted the sentence of dismissal, it would have been more proper to have disapproved findings. (C. M. O. 111, 1919.)

PROCEEDINGS IN REVISION.

Admissibility of letters of third parties. *See* EVIDENCE.

PROCLAMATIONS. *See* JUDICIAL NOTICE.

PROFANE.

What constitutes being—The word "profane" is defined as "exercising or manifesting irreverence, disrespect, or undue familiarty toward the Deity or religious things; blasphemous; sacrilegious; irreligious; impious." (C. M. O. 258, 1919, 2.)

PROHIBITION ACT.

National—Does not repeal any of the provisions of the war prohibition act, or limit or annul any order or regulations prohibiting the manufacture, sale, or disposition of intoxicating liquors, within prescribed zones; nor does it prohibit the use of the power of the military or naval authorities to enforce the regulations of the President or Secretary of War or Navy during the war or demobilization. (C. M. O. 48, 1920, 9.)

PROMOTION.

1. *See also* DENTAL CORPS; NAVAL RESERVE FORCE; OFFICERS; PROMOTION BY SELECTION; RETIRED OFFICERS.
2. **Appointments to upper grades of staff departments of Marine Corps**—Are not promotions requiring examinations, because the officer reverts to his permanent rank on termination of his four-year detail. (C. M. O. 48, 1920, 8.)
3. **Circumstances under which physical examination for, may be conducted by single medical officer**—Should any officer after qualifying physically be suspended from promotion because of professional deficiencies, he might thereafter be promoted when found mentally, morally, and professionally qualified without any further physical examination; or he might under such circumstances be examined and promoted upon the informal report of a single medical officer or a nonstatutory board. (File 26266-627:1; Sec. Nav., 30 Jan., 1919; C. M. O. 39, 1919, 22.)
4. **Date of fixing eligibility for selection**—Captains, commanders, and lieutenant commanders who will have served four years in their present grade by 30 November next after the convening of the board for selection for promotion, are eligible for consideration thereby notwithstanding the fact that at the time of such consideration they shall not have served four years in their present grade. (Op. Atty. Gen., 14 July, 1917; C. M. O. 46, 1917, 24.)

5. **Eligibility for**—Former pay clerk to chief pay clerk. (C. M. O. 153, 1919, 35.)
6. **Examination for, in the Marine Corps**—A mental, moral, and professional examination is required for promotion in the Marine Corps to the grades of first lieutenant, captain, major, lieutenant colonel, and colonel. A mental, moral, and physical examination is required for promotion in the Marine Corps to the grade of brigadier general, and a physical examination is required for promotion to the grade of major general. (File 26521-405:1, Sec. Nav., 15 Sept., 1920; *See also* file 26521-405, 30 June, 1920; C. M. O. 119, 1920, 18.)
7. **Examination taken prior to but not finally acted upon before August 29, 1916**—The act of August 29, 1916 (39 Stat. 578), providing that "Hereafter, all promotions to the grades of commander, captain, and rear admiral of the line of the Navy * * * shall be by selection only from the next lower respective grade * * *" made null and void the examination for promotion of an officer who was undergoing examination prior to that date in accordance with the then existing law, where such examination and promotion were completely consummated prior to the passage, on August 29, 1916, of the above act changing the law governing the promotion of said officer. The examination in question having been nullified upon the approval of this law, it follows, therfore, that subsequent action upon such examination could carry with it no legal consequence such as would have obtained had action been taken prior to the change in the law. (File 26260-3663: 2, Sec. Navy, Oct. 9, 1916; C. M. O. 37, 1916, 7.)
8. **Laws governing the selection board in making recommendations for temporary promotions**—It has always been the view of the Judge Advocate General that the statutory provisions regulating permanent promotions in the Navy have no application to the temporary promotions authorized by the act of 22 May, 1917, and that the procedure to be followed in making such temporary promotions is a matter "to be regulated by the President in his discretion." (File 28687-22.) The fact that the Secretary of the Navy has established a procedure with reference to temporary promotions to the grades of commander, captain, and rear admiral, somewhat similar to that required by the act of 29 August, 1916, for permanent promotions to these grades, does not give to the adopted procedure the binding force of law. (File 26521-230:5, J. A. G., 1 Feb., 1918; C. M. O. 15, 1918, 19.)
9. **Officers designated for engineering duties only.** *See* ADDITIONAL NUMBER. (C. M. O. 296, 1919, 11.)
10. **Permanent and temporary promotions of staff officers**—An assistant paymaster was appointed as such in the permanent Navy with the rank of ensign from July 21, 1917. For the purpose of fixing his permanent status, and for promotion on the permanent list, he takes rank after the last permanent ensign dating from 29 June 1917. His temporary running mate is the last temporary ensign dating from 1 July, 1917. His permanent running mate has been advanced to temporary lieutenant (junior grade) and his temporary running mate has not been so advanced. It was held that the last temporary ensign appointed from 1 July, 1917, is his running mate for the purpose of temporary promotion, and that he is entitled to permanent advancement with the last permanent ensign appointed from 29 June, 1917. His position on the permanent list being next after the permanent ensign appointed next ahead of him, he is entitled to revert to this position upon the termination of any temporary appointment he may receive. (File 26521-234, J. A. G., C. M. O. 15, 1918, 20.)
11. **Precedence after selection**—Precedence of officers promoted under provision of act 11 July, 1919, after selection by selection board. (C. M. O. 280, 1919, 19.)
12. **Respective powers of Congress and the President.** *See* APPOINTING POWER.
13. **Staff officers**—Advancement of staff officers to higher offices with or without advancement in rank is a matter resting entirely within the constitutional power of the President, subject to such regulations by Congress as may not deprive him of the right to exercise his individual judgment and will. (File 28687-4:4, J. A. G., Sept. 12, 1916; C. M. O. 3, 1917, 9.)
14. **Staff officers**—Where advancement in rank in the Staff Corps involves promotion in grade, the officers selected for such advancement are subject in all respects to the examinations prescribed by sections 1493 and 1496 of the Revised Statutes. (File 28687-4:5, J. A. G., 23 Nov., 1916; C. M. O. 3, 1917, 9.)
15. **Suspended from, for permanent physical disability**—Officers should not be, but retired or wholly retired. (C. M. O. 304, 1919, 20.)

16. **Temperamental qualifications**—The fitness reports of an officer being examined for promotion indicated that he "is irritable," that "scolds and nags enlisted men," and that in dealing with enlisted men he "habitually expresses ill temper in his speech and manner." The department, in its action on the record of the examining board, took occasion to remark that "such temperamental characteristics are most seriously detrimental to success and efficiency, both of the individual and of the organization to which attached. They are regarded by the department as strong evidence of disqualification for promotion, unless subsequent reports indicate their correction by the officer." (File 26260-5156; C. M. O. 67, 1917, 19.)
17. **Temporary and permanent officers**—An ensign was appointed as such in the permanent Navy on 7 July, 1917, with rank next after the last temporary ensign appointed on 1 July, 1917. The permanent ensign next above him on the list was appointed 29 June, 1917. It was held that if promotions are in accordance with the rule of seniority, he would become entitled to temporary promotion after the last temporary ensign dating from 1 July, 1917. In order to preserve his place on the list of officers of the permanent Navy, to which he can revert upon his termination of any temporary appointment he may receive, his position is fixed in the permanent service next after the last permanent ensign dating from 29 June, 1917; and he is entitled, if promotions are by seniority, to advancement in the permanent Navy next after the last permanent ensign dating from 29 June, 1917. (File 26521-243, J. A. G.; C. M. O. 15, 1918, 19.)
18. **Temporary and permanent** *See also* APPOINTMENT, TEMPORARY, AND PERMANENT.
19. **Vacancy required**—No officer, whether an additional number or not, can be promoted unless a vacancy exists in the grade to which such promotion is made; when a vacancy does exist, if the officer selected and promoted thereto is an additional number, his promotion will not fill same, and another officer who is a regular number, may be promoted to such vacancy. (C. M. O. 35, 1920, 23.)
20. **Waiver of physical disability on examination for promotion.** *See* PHYSICAL DISABILITY.

PROMOTION BY SELECTION.

1. *See also* LOSS OF NUMBERS.
2. **Additional number**—Officers should be promoted precisely in the same manner as though they were not additional numbers. (C. M. O. 35, 1920, 23.)
3. **Advancement of staff officers in rank without change in office**—The advancement of staff officers in rank without change in office may be regulated by Congress, but Congress has not enacted any statutory regulations on the subject other than as applicable only to the lower ranks in said corps. Accordingly, the President may in his discretion select any staff officer with the rank of captain for advancement to the rank of rear admiral in the same office, or he may prescribe general rules governing such advancement in rank—the rank of rear admiral in the staff corps having been established by recent law without making any provision as to how advancements thereto shall be effected. (File 28687-4:5, J. A. G., Nov. 23, 1916; C. M. O. 3, 1917, 7.)
4. **Advancement of staff officers to higher offices with or without advancement in rank.**—From time immemorial, the advancement of naval officers to higher offices has been made by seniority. This rule however was not established by Congress, but by the Executive branch of the Government, although since its inception statutes have been enacted by Congress in recommendation of the rule and even purporting to make the same obligatory. To this effect are sections 1458 and 1480, Revised Statutes, providing for promotion by seniority and modified by subsequent statutory enactment, only to the extent that the act of Augnst 29, 1916, established a system of promotion by "selection" for certain line officers. (File 28687-4:5, J. A. G., Nov. 23, 1916; C. M. O. 3, 1917, 8.)
5. **Age limit**—The extension of the age limit in the case of commanders is not affected by the naval appropriation act of 1920. Moreover, it will be necessary for lieutenant commanders and captains of temporary rank and over the age limit to request deferment of the age limit. And, officers of permanent rank but near the age limit must request deferment prior to the date on which they reaeh the age limit or be retired on June 30, 1920. (File 27231-158:5, J. A. G., June 5, 1920; C. M. O. 85, 1920, 20.)
6. Officers of each grade take precedence in accordance with their seniority in the grade from which promoted and not necessarily from the date of commission. (C. M. O. 35, 1920 24.)

7. **Portion of records to be submitted**—The act of August 29, 1916 (39 Stat. 578–579), provides for the promotion by selection to the grades of commander, captain, and rear admiral of the Line of the Navy.

Held, That the act of June 18, 1878 (20 Stat. 165), which limits the part of the record of officers, examined for promotion in accordance with the laws in effect prior to August 29, 1916, to be considered by the examining board (Naval Regulations, 1913, R–334 (2)) is not applicable to the different form of promotion established by the above-mentioned act; and accordingly the entire records of officers eligible for promotion under the terms of the act of August 29, 1916, should be transmitted to the board of selection. (File 26251–169, J. A. G., Nov. 28, 1916; C. M. O. 3, 1917, 7.)

PROMOTION AND RETIREMENT.

Laws in relation thereto, as affecting captains of the line wounded in line of duty. (C. M. O. 237, 1919, 26.)

PROOF.

1. **Definition of**—Proof is merely that quantity of evidence which produces a reasonable assurance of the ultimate fact. Proof is that degree and quality of evidence that produces conviction. (Words and Phrases Judicially Defined, vol. 6, p. 5684.)
2. **Scienter**—Class of cases in which scienter must be proved. (C. M. O. 160, 1919.) *See* SCIENTER.
3. **Unnecessary where the offenses be admitted in open court**—An accused was charged with libeling his superior officer, the contents of the letter in question being set out in full in the specifications. He admitted the authorship, but reserved the right to object later to the admission of the letter itself into evidence. *Held*, proof was unnecessary. He admitted authorship of the letter after which evidence by the judge advocate to establish the fact would have been not only unnecessary but objectionable. (C. M. O. 5, 1917, 3.)

PROPERTY.

Taken from prisoners—There is no law or regulation under which it would be proper to retain the private property of an individual who is no longer lawfully under the jurisdiction of the Navy. (File 26251–18007:11, J. A. G., 20 Feb., 1920; C. M. O. 48, 1920, 35.)

PROPERTY, PRIVATE.

Reimbursement for loss, destruction, or damage—The stores belonging to an officers' mess are the personal property of the officers composing the mess, and they are such articles of personal property as are required by the Navy Regulations (R–4517 and I–821–828, 4545, Navy Regulations, 1913). Therefore reimbursement may be made to an officers' mess for the loss, destruction, or damage of such stores under the circumstances prescribed by the act of 6 October, 1917, on the certificate of the Chief of the Bureau of Navigation that the stores for which reimbursement is claimed are reasonable, useful, and proper for such officers' mess. (File 26283–1461:2, J. A. G., 25 Apr., 1918; C. M. O. 37, 1918, 27.)

POSSESSION OF OTHER MEN'S PROPERTY.

Should be made an offense by means of a special local order. (C. M. O. 6, 1921, 28.)

PROVOST COURTS.

1. *See also* COURTS, EXCEPTIONAL MILITARY; MILITARY COMMISSIONS; SUPERIOR PROVOST COURTS.
2. **Conduct of, when convened by naval authority**—A provost court should, in general, correspond to a deck court both as to its constitution and to its proceedings. Evidence taken before such a court need not necessarily be recorded. A provost court ordinarily should not be granted authority to impose sentences involving confinement for more than six months, nor fines of more than $300. (C. M. O. 15, 1917, 8.)

PUBLIC HEALTH AND MARINE HOSPITAL SERVICE.

1. **Officers can not administer discipline to members of the Navy**—Medical officers of the Public Health and Marine Hospital Service are without authority of law to administer discipline to naval or Marine Corps patients under their care and can only take such action as could be taken in the case of a civilian being treated in the hospital, i. e., preserve order and compel compliance with the rules or regulations governing patients in the hospital, such action not being taken as a matter of administering punishment. (File 28092–21, J. A. G., Apr. 7, 1917; C. M. O. 32, 1917, 6.)

2. **Rendering service for the Navy**—In conformity with section 1757, Revised Statutes, officers of the Public Health and Marine Hospital Service are required to take the oath of allegiance upon appointment. They should not therefore be required to take any further oath when rendering service for the Medical Department of the Navy. (File 2892–21, J. A. G., Apr. 7, 1917; C. M. O. 32, 1917, 6.)

PUBLIC OFFICERS.

Pay. *See* PAY OF PUBLIC OFFICERS.

PUBLIC PROPERTY.

1. **Checkage of pay for loss or damage**—The pay of persons in the naval service can not, in the absence of legislation like that existing for the Army or for the Naval Militia in the act of 29 August, 1916, legally be checked or withheld, directly or indirectly, to prevent financial loss to the Government for loss or destruction of its property through the fault of such persons. (File 5012–57:3, J. A. G., 3 May, 1918; C. M. O. 50, 1918, 29.)
2. **Compensation in lieu of punishment for loss**—There is no law which requires or permits an enlisted man to make a cash deposit covering the value of lost public property in lieu of being tried by court-martial for responsibility for such loss. (C. M. O. 35, 1920, 26.)
3. **Embezzlement of, defined.** *See* EMBEZZLEMENT.
4. **Stolen or pawned**—No pawnbroker may legally retain property of the United States which has been stolen and pawned. It is the duty of any such broker having such property in his possession to return the same to the United States on demand, and, in the event of his refusal to do so, legal proceedings against him may be instituted through the Department of Justice. Also the United States, through any of its officers or representatives detailed for the purpose, may retake said property if this can be done without a breach of the peace. In any event the United States can not be required, nor is it authorized, to refund the amount loaned on its property by a pawnbroker to persons by whom said property has been stolen. (File 26804–8, J. A. G., Aug. 28, 1916; C. M. O. 30, 1916, 8.)

PUBLIC REPRIMAND.

1. **Disapproved**—In order to bring the attention of the service to the fact that the department does not favor such a sentence. (C. M. O. 38, 1916.)
2. **Not favored.** (C. M. O. 4, 1916, 3.) *See also* JUDICIAL NOTICE.

QUARTERS.

Assignment—Article 4511 (1), Navy Regulations, 1913, requires that the quarters permanently designated in accordance with its terms be occupied by the officers specified. The regulation is to be construed in the light of service conditions and admits of a temporary shift of duties or an assignment to an acting office, as the exigencies of the service may require, without necessitating confusing and impractical changes of quarters. (File 26806–147, J. A. G., 23 Oct., 1917; C. M. O. 67, 1917, 19.)

QUESTIONS BY THE COURT. *See* WITNESSES.

QUESTIONS OF FACT.

Duty of courts—In determining the question of fact the members of the court must arrive at their conclusions solely from the evidence that is adduced or comes before the court and not from any knowledge or information otherwise acquired. In exercising this part of its function a court is assisted by a knowledge and application of the rules of evidence, but no considerable knowledge of the law is required. (C. M. O. 25, 1916, 4.)

RANK.

1. *See also* PRECEDENCE.
2. **Acting appointees are entitled to such precedence.** *See* COMMAND, FLEETS, AND SQUADRONS.
3. **Advances in, without change in grade.** *See* PROMOTION BY SELECTION.
4. **Reduced in, construction of**—A marine was sentenced to be reduced from corporal to private, first class. As he had never held the rank of private, first class, and in view of file 26806–163, J. A. G., 13 Dec., 1918, cited in C. M. O. No. 190, 1918, 26, the legality of such sentence was questioned. *Held:* That the sentence is legal, as article 30 A. G. N., provides for "reduction to the next inferior rating," and the next inferior rating to corporal is that of private, first class, as shown by Changes No. 2 of Naval Courts and Boards, 1917. Thus overruling in this regard the above-cited opinion. (File 26287–5529, J. A. G., 17 Mar., 1919; C. M. O. 186, 1919, 26.)

RANK AND PRECEDENCE.

1. **Admirals assuming command on same date.** (C. M. O. 209, 1919, 25.)
2. **Temporary and permanent commissions.** *See* PRECEDENCE.

RATING.

1. *See* REDUCTION IN RATING.
2. **Changes.** *See* NAVAL RESERVE FORCE.

RATIONS.

1. **Diminished**—As a sentence. *See* SENTENCE.
2. **General court-martial prisoners.** *See* GENERAL COURT-MARTIAL PRISONERS.
3. **Fleet Naval Reserve**—The retainer pay of all members of the Fleet Naval Reserve, not on active duty, and while in a naval hospital for treatment, should be checked 30 cents per ration for each day therein, and the same should be credited to the Navy hospital fund. (File 28550–23, J. A. G., 24 Nov., 1917; C. M. O. 41, 1916, 7.)
4. **Chaplains.** *See* CHAPLAIN, ACTING.

REASONABLE DOUBT.

1. **Recommendation to clemency based on a reasonable doubt of the guilt of the accused.** *See* CLEMENCY.

RECOMMENDATION TO CLEMENCY.

1. *See* CLEMENCY.
2. **Should not be based on doubt as to guilt of accused.** (File 26262–4893, Sec. Nav., 22 Aug., 1918; G. C. M. Rec. No. 39598; C. M. O. 114, 1918, 28.)

RECONVENING.

1. **Of court-martial.** (C. M. O. 9, 1921, 11.)

RECORD.

1. **Portions to submit to selection board.** *See* PROMOTION BY SELECTION.
2. **Should show that privilege of cross-examination was accorded**—The cross-examination of a witness is an important step in the proceedings of a court, and if not availed of for any reason the record should affirmatively show by suitable entry that the privilege was accorded the party whose right it was to so examine. It is the constitutional right of an accused to be afforded opportunity to cross-examine witnesses upon the evidence they may give against him. (File 26262–4696; G. C. M. Rec. No. 39038; C. M. O. 114, 1918, 28.)

RECORD OF COURT-MARTIAL.

1. **Effect of loss of, upon return to court for correction of error**—An accused was mistakenly arraigned under a name other than his own. The record was returned to the court for revision, at which time it was lost, and due and diligent search failed to disclose its whereabouts. The foregoing error in arraignment, unexplained, was held to be a fatal defect in the proceedings, and the department disapproved the proceedings, findings, and sentence. (File 26251–1734, J. A. G., G. C. M. Rec. No. 39987; C. M. O. 77, 1919.)
2. **Preliminary examination in re competency of witness should be made a part of.** (C. M. O. 253, 1919.)

RECORDS OF THE DEPARTMENT.

1. *See also* LINE OF DUTY.
2. **Expunging record of bad conduct discharge.** *See* BAD CONDUCT DISCHARGE.
3. **Parts thereof may not be expunged**—The department knows of no method by which the sentences adjudged by court-martial may be eradicated from its records. On the contrary, those records should remain inviolate and unchanged. (File 24413–5.) The record must correctly show the true facts of the case. (File 7675–214; *see also* Naval Digest, 1916, p. 513; File 26282–332, Sec. Navy, 11 Jan., 1918; C. M. O. 4, 1918, 20.)

RECORDS OF OFFICERS.

Evidence—Records of officers must be introduced in evidence before the court can properly take cognizance of contents. (C. M. O. 17, 1917.)

RECORD OF PREVIOUS CONVICTION.

Record of proceedings—Must show that section 326, Naval Courts and Boards, 1917, has been complied with. (C. M. O. 2, 1919.)

RECORD OF PROCEEDINGS.

1. **After plea of guilty**—Should show affirmatively that the prosecution and defense offered no evidence and also that the accused did not desire to make a statement. (C. M. O. 126, 1919.)
2. **Courts convened by marine officers embarked as separate organization.** *See* MARINE OFFICERS.
3. **Certified copies of efficiency reports need not be appended**—It is not necessary for the court to append the original or certified copies of efficiency reports to the record of proceedings when introduced in evidence before a general court-martial, but a simple notation in the record that they were submitted in evidence is sufficient; the originals forming a part of the officer's official record on file at the department may readily be examined at any time in connection with courts-martial proceedings. (File 26251–7777, Sec. Navy, July 2, 1913; C. M. O. 1, 1914, 7; C. M. O. 19, 1615, 9; C. M. O. 14, 1916, 2.)
4. **Effect of change of status of a member**—An assistant surgeon in the Medical Reserve Corps was appointed as a member of certain boards. He was then enrolled as a passed assistant surgeon in the United States Naval Reserve Force, no change being made in the precepts of the boards. Upon request for advice as to his legal standing on said boards, he was informed that his standing was legal and his change of status did not invalidate any action of any boards on which he was serving, provided he had not been regularly detached from duty on said boards. He was also informed that pending the receipt of new precepts setting forth his correct title and branch of the service, he should attach to each record of proceedings of the boards evidence of his change of status in form of certified copies of the letters from the department notifying him of his changed status. (File 28550–272, J. A. G., 9 Mar., 1918; C. M. O. 30, 1918, 30.)
5. **Members of courts-martial should be affirmatively shown**—The record of proceedings of a general court-martial for a certain day of the trial recited as present all the members, judge advocate, etc., and the next entry showed that a telegram had been received appointing an additional officer as member. No entry indicated his presence as such member, but his name appeared among those authenticating the record, and it was assumed therefrom that he was duly sworn with the other members of the court later in the same day. *Held*, That the record should have affirmatively shown that said member was present. (File 26251–1504, J. A. G., 17 Jan., 1918; C. M. O. 4, 1918, 16.)
6. **Opinion**—Of judge advocate allowed on record. *See* EXCEPTIONS.
7. **May not be expunged.** *See* RECORDS OF THE DEPARTMENT.

RECRUITING. *See* RECRUITS.

RECRUITING STATION.

Chief petty officer—May be placed in charge of recruiting station. (C. M. O. 38, 1917, 11.)

RECRUITS.

Postmasters of certain classes are entitled to a bonus for securing recruits—A postmaster procuring for reenlistment an ex-marine within one week of the date of his discharge from the Marine Corps is entitled to the sum of $5 granted by the act of August 29, 1916, to postmasters of certain classes who procure the enlistment of recruits. (File 7657–425, J. A. G., Mar. 1, 1917; C. M. O. 22, 1917, 10.)

REDUCTION IN RATING.

1. **By commanding officer**—Can not be of more than one rating at a time, even though they may have been such as were established by himself. As noted in article 24, Articles for the Government of the Navy, a commanding officer is authorized to inflict a punishment on a petty officer of reduction of any rating established by himself, and reduction in rating, it is noted, is singular and does not mean ratings. A summary court-martial is only authorized to inflict punishment of reduction to the next inferior rating. It would be inconsistent to hold that a reduction by a commanding officer of a gunner's mate first class to a rating of seaman was within the above regulations, inasmuch as such reduction would exceed that which a summary court-martial would be authorized to inflict. (File 26254–2881; 103, Sec. Nav., 21 May, 1920; C. M. O. 76, 1920, 20.)
2. **Illegal sentence.** (C. M. O. 8, 1921, 13.)
3. **Included in sentences involving confinement.** (C. M. O. 12, 1921, 16.)
4. Revocation of permanent appointment as chief petty officer not considered reduction in rating. (C. M. O. 5, 1921, 16.)
5. **Table of classification for:** (C. M. O. 11, 1921, 12–18.)

6. **Time it becomes effective**—An accused was arraigned and tried as a sergeant, but in the convening authority's action on the case the accused is referred to as a private. The latter is erroneous, as it was the action of the covening authority upon the sentence of the accused which reduced the accused to a private, and until the convening authority's action is completed the accused is a sergeant and should be so designated in his action. (File 26262–7786, J. A. G., 1 Oct., 1920; G. C. M. Rec. No. 49995; C. M. O 119, 1920, 13.)
7. **Under article 24, Articles for the Government of the Navy, and article 3552, Navy Regulations, 1913**—Reduction in rating by a commanding officer as a punishment for an offense is wholly governed by article 24, Articles for the Government of the Navy, and is a specific limitation upon the powers of commanding officers. Reduction in rating under article 3552, Navy Regulations, 1913, can only be made by a commanding officer where it is evident that the man is unqualified for the rating. It is not authority for a reduction in rating as a punishment. (File 7657–1088, Sec. Navy, 16 Oct., 1920; C. M. O. 127-1920, 14.)
8. **Warrant officer reduced to fireman first class**—A warrant officer was charged with disobeying the lawful order of his superior officer, drunkenness on duty, and conduct to the prejudice of good order and discipline, and sentenced to be reduced to the rating of fireman first class. *Held*, That the only provision of law authorizing the reduction of an officer to an enlisted rating is found in article 9, A. G. N., and it authorizes such punishment only in the case of an officer "who absents from his *command* without leave." (C. M. O. 34, 1918, 2.)

REDUCTION TO NEXT INFERIOR RATING.

Classification for Marines. (C. M. O. 9, 1921, 12; 12, 1921, 16.)

REENLISTED MARINE.

Not inclusive of soldier enlisted in Marine Corps—In view of the unambiguous phraseology of General Order 110 in which the words "Reenlisted marine" are used, a soldier who enlists in the Marine Corps for the first time, upon the termination of an enlistment in the Army, is not to be regarded as a reenlisted man within the purview of said general order. (File 26516–144:53, Sec. Navy, Apr. 12, 1916; C. M. O. 13, 1916, 8.)

REENLISTMENT.

1. *See also* ALIEN ENEMY.
2. **An officer who had been sentenced by court-martial to dismissal**—A convening authority recommended that in view of the recommendation of the court to clemency and the fact that the accused had been a chief petty officer in good standing, that he be allowed to reenlist after dismissal, as a chief turret captain, the rate from which he had been commissioned. The Bureau of Navigation concurred in the recommendation. (C. M. O. 67, 1918, 2.)
3. **The effect of pardon for desertion upon the question of reentrance in the service.** *See* DESERTION.

REGULATIONS, NAVY.

1. **Anticipate**—"Not only is it impracticable to anticipate in the Navy Regulations every contingency which may possibly arise, but an attempt to do so would not be conducive to the proper development of character and officer-like qualities." (C. M. O. 27, 1916, 5)
2. The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner. (Compiled Statutes, Title XV, ch. 7, sec. 2805; C. M. O. 76, 1920, 19.)
3. **Sources and authority**—It has been repeatedly and consistently held that the Navy Regulations, duly approved by the President as Commander in Chief of the Navy, have the force and effect of law in their application to all persons in the naval service.

   It has also been held that regulations expressly approved by Congress have the same force and effect as statute law. (File 26254–1451:11, Apr. 12, 1915.)

   "Regulations not approved by Congress have the force of law when not in conflict with any statute." (File 26254–1451:11, Apr. 12, 1915.)

   "The Navy Regulations have the force and effect of positive law." (23 Op. Atty. Gen. 27.)

   "A regulation which has been in force for many years will be sustained unless Congress has annulled it by positive enactment." (16 Op. Atty. Gen. 621.)

   "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers

and clerks, the distribution and performance of its business, and the custody and use of the records, papers, and property appertaining to it." (R. S. 161.)

"The Secretary of the Navy is authorized to establish 'Regulations of the Navy,' with the approval of the President (12 Stat. 565; R. S. 1547.) Such regulations have the force of law." (Gratiot *v* U. S., 4 How. 80.)

"The validity of a regulation" (even when) "not expressly approved either by Congress or the President will be sustained by the Supreme Courts unless 'it is plainly and palpably inconsistent with law,' * * *." (File 26254-1451:11, Apr. 12, 1915; File 8103-19:14, J. A. G., 14 May, 1920; C. M. O. 76, 1920, 19.)

REINSTATEMENT.

And appointment distinguished. *See* APPOINTMENT.

RELIGIOUS OBSERVANCES.

Constitutionality of statute compelling—"A statute making it obligatory upon officers or soldiers to attend religious services on Sunday (or other day) would be of doubtful constitutionality, as opposed to the spirit if not the letter of the organic law." (Winthrop's Military Law and Precedents, 2d ed., vol. 2, p. 1015.) C. M. O. 48 1920, 13.)

REMISSION.

Sentence—When sentence includes a term of confinement together with "accessories" the confinement should not be remitted without remitting the loss of pay in whole or in part. (C. M. O. 3, 1917, 4.)

REPRIMAND.

Recommendation—That letter of reprimand be addressed to an officer and filed with efficiency record, approved. (C. M. O. 24, 1917.)

RES GESTAE.

What constitutes. (C. M. O. 7, 1921, 13.)

RES ADJUDICATA. (File 26256-41:3, J. A. G., Mar. 14, 1912.)

RESPONSIBILITY.

1. **Concurrent**—Where concurrent responsibility is imposed by the Navy Regulations upon several individuals and an accident occurs, it is illogical to hold that a junior is guiltless because a senior was present. The concurrent responsibility which has been established by the Navy Regulations is an additional safeguard of the Government in keeping its ships afloat; not to recognize this in effect nullifies this feature of the regulations. An endeavor to place the burden of entire responsibility upon some one individual results in confusion and a miscarriage of justice. The only logical method is to hold each individual concerned responsible not for the accident itself but for neglect of such of his individual duties as may have contributed to the accident. (*See also* C. M. O. 33, 1913; C. M. O. 24, 1916, 4.)
2. **Evasion by acquiescence in orders of superior known to be wrong**—The commanding officer of a vessel can not relieve himself of the responsibility for the safe conduct of the vessel under his command without a definite protest when he realizes that the vessel, in obedience to an order, is being steered from an uncertain position into known danger. (C. M. O. 26, 1916, 3.)

RESTORATION OF LOSS OF NUMBERS BY PARDON. *See* PARDONS.

RESTRICTION.

1. **Breaking restriction will not support the charge of breaking arrest.** *See* BREAKING ARREST.
2. **Summary court-martial**—An enlisted man was sentenced "to be restricted to the limits of the ship for a period of 30 days." This part of the sentence was set aside by the Secretary of the Navy, as the summary court-martial was without power to adjudge it. (C. M. O. 5, 1916, 6.)

RETAINER PAY. *See* PAY.

RETIRED.

Wholly—Or suspended from promotion for one year, then reexamined. (C. M. O. 304, 1919.)

RETIRED ENLISTED MEN.

1. **Jurisdiction of retired enlisted men for purposes of trial by general court-martial**—There is no statute specifically providing that retired enlisted men shall constitute a part of the Navy or that retired enlisted men of the Navy shall be amenable to trial by naval court-martial, although it is provided by statute that retired officers of the Navy shall be amenable to trial by general court-martial (sec. 1457, Revised Statutes).

While it would appear from the previous departmental holdings in the matter that a retired enlisted man is not subject to trial by court-martial when not employed on active duty, it should be noted that such holdings were made prior to the act of March 3, 1915 (38 Stat. 941), which provides that—

"The Secretary of the Navy is authorized in time of war, or when, in the opinion of the President, war is threatened, to call any enlisted man on the retired list into active service for such duty as he may be able to perform. * * *."

It would appear from the act of March 3, 1915, that Congress regards retired men as "persons in the naval service of the United States," otherwise they would not be subject to call in time of war, they being bound by no obligation so to serve as in the case of a naval reservist. It should also be noted in this connection that enlisted men when placed on the retired list at the expiration of 30 years' service are not discharged from their enlistments, but they are transferred to the retired list and regarded as continuing in the service on the retired list. (Art. 3672 (2), U. S. Navy Regulations.)

Under the present laws it is very doubtful whether an enlisted man on the retired list, who is not employed on active duty, is subject to trial by naval court-martial. File 26251-22500, J. A. G., 9 Mar., 1920; C. M. O. 60, 1920, 24.)

2. **On active duty**—Enlisted men who have been transferred to the retired list and who have been called to active service under the provisions of the act of August 29, 1916, continue "on the retired list," although performing active duty, and they should not therefore be discharged from the enlistment upon which they were serving when placed upon the retired list. (File 7657-467:1, Sec. Navy, 13 Sept., 1917; C. M. O. 58, 1917, 12.)
3. **Promotion and pay on active duty**—There is no statutory prohibition against the advancement of a retired enlisted man, employed in active service pursuant to authority contained in the act of 29 August, 1916, to a higher rating, such higher rating to continue during the active service status of the enlisted man. There is also no provision in the Navy Regulations which would preclude the advancement in question. But legislation would be necessary to enable retired enlisted men who have been advanced in rating to receive the pay of the rating to which advanced. (File 7657-585, J. A. G., 2 Apr., 1918; C. M. O. 37, 1918, 27.)

RETIRED OFFICERS.

1. **Active duty**—Any retired commissioned officer of the Navy or Marine Corps may be ordered to active duty at sea or on shore in the discretion of the Secretary of the Navy in time of war or national emergency (40 Stat. 717). (C. M. O. 48, 1920, 24.)
2. **Allowances**—Act of August 29, 1916. (C. M. O. 33, 1916, 7.)
3. **As members of courts-martial.** *See* JURISDICTION.
4. **Employment by company making naval supplies**—A retired officer of the Navy may not act as director of a company furnishing naval supplies or raw material to the Government, such employment coming within the prohibition of the act of 10 June, 1896 (29 Stat. 361). (File 9736-70, Sec. Navy, 19 Oct., 1917; C. M. O. 67, 1917, 20.)
5. **Government contractors**—A retired officer refunded his retired pay for an entire period during which he had been employed by a firm making naval supplies and war materials. He did this in an effort to comply with the provisions of the act of June 10, 1896 (29 Stat. 361), which prohibits payment to any officer in the Navy or Marine Corps on the active or retired list while such officer is employed by any person or Company furnishing naval supplies or war materials to the Government and makes such employment unlawful. The department held that the return of the pay due him for the time he was so employed did not fully relieve him from his responsibility, such employment being unlawful, and directed that he be admonished to be more careful in the future. (File 9736-61:1-2, Dec. 8, 1916; C. M. O. 46, 1916, 8.)
6. **Judge Advocate General**—A retired officer of the Navy or Marine Corps may be appointed Judge Advocate General. *See* JUDGE ADVOCATE GENERAL.
7. **Jurisdiction**—Naval courts-martial have jurisdiction over retired officers of the Navy and Marine Corps. (C. M. O. 34, 1916.)
8. **Members of general court-martial.** (C. M. O. 8, 1921, 13.)
9. **Pay.** *See* PAY.
10. **Promotion.** *See also* "NOT IN LINE OF PROMOTION."
11. **Promotion**—A staff officer having been retired at the age of 62 years, after approximately 35 years of service, with the rank of captain, made request that he be given the rank of commodore, under section 1481 of the Revised Statutes. *Held*, the act of 5 August, 1882, providing that "hereafter there shall be no promotion or increase

of pay in the retired list of the Navy, but the rank and pay of officers on the retired list shall be the same that they are when such officer shall be retired," clearly repeals so much of the porvisions of section 1481 of the Revised Statutes as authorized the promotion of staff officers to the grade of commodore on the retired list after having completed 40 years from their entry into the service, where such officers have not actually served 40 years before retirement. (File 27231–112, J. A. G., 1 Apr., 1918; C. M. O. 37, 1918, 28.)

12. **Promotion**—The department reaffirms its decisions in regard to the promotion o retired officers under the provisions of section 1481, Revised Statutes, as amended by the act of August 5, 1882. (File 27231–141:2, J. A. G., 25 June, 1920; C. M. O. 85, 1920, 23.)
13. **Receiving salaries from the Government besides retired pay**—A retired naval officer whose retired pay amounts to $2,160 per annum is ineligible under the pro visions of the act of 31 July, 1894 (23 Stat. 205), to be appointed to or hold the office of special agent, Department of Justice, only if said office carries with it a compensation of $2,500 per annum. If it is less, there is no statutory prohibition against his being appointed to or holding it and at the same time drawing his retired pay If the appointment were one under a State government, there is no Federal law prohibiting his appointment or restricting the amount of compensation received therefor. (File 9736–85, J. A. G., 14 Feb., 1920; C. M. O. 48, 1920, 36.)
14. **Withholding pay of retired officers illegally employed**—The employment of a retired officer by the Shipping Board is not sufficient to justify a supply officer o the Navy in refusing to make payments to him as a retired officer of the Navy. If such officer's employment by the Shipping Board is illegal, the illegality is not one for which the supply officer is responsible, and if illegal payments have been made to such retired officer by reason of such employment they were made by the Shipping Board and not by the supply officer. (File 9736–90, J. A. G., 15 Mar., 1920; C. M. O. 60, 1920, 18.)

RETIRED WARRANT OFFICERS.

Dismissed—Retired warrant officer dismissed for failing to pay debts, etc. (C. M. O. 34, 1916.)

RETIREMENT.

1. **Officers: Advance in rank**—Temporary officers of the Marine Corps may be retired only with the rank they hold on retirement, and they may not be temporarily promoted to the rank held by them at the time of incurring disability, for the purpose o f retirement. (File 27231–164, J. A. G. 20 July, 1920; C. M. O. 101, 1920, 17.)
2. **Chief warrant officers.** (C. M. O. 4, 1921, 18.)
3. **Civilians who were formerly temporary officers.** (C. M. O. 1, 1921, 16.)
4. **Officers: Continuous service and double time**—The retirement laws governing enlisted men have no application to an officer retired by reason of ineligibility on account of age for promotion, because that form of retirement is not retirement for length of service, the only form of retirement to which double time is applicable. *Held*, That the officer in question could not count as double time his service as an enlisted man during the Spanish-American War. *Held further*, That time intervening between his discharge and reenlistment as an enlisted man could not be counted in computing his service, even though he were being retired for length of service and as an enlisted man. (File 27231–158:4, J. A. G., 26 June, 1920; C. M. O. 85, 1920, 21.)
5. **Former officers of the Naval Reserve Force.** (C. M. O. 7, 1921, 19.)
6. **Former temporary officers.** (C. M. O. 7, 1921, 19.)
7. **Naval Reserve Force.** (C. M. O. 4, 1921, 16.)
8. **Officers: Date effective**—The question was presented to the Attorney General whether, in the case of an officer who has been retired on his own application after 40 years' service pursuant to section 1443, Revised Statutes, his retirement took effect so as to create a vacancy which might be filled by the appointing power, at the date his application for retirement was approved by the President, or not until he received notice of the President's action.

   The Attorney General expressed the view that while the subject is not free from doubt, for the purpose mentioned, the vacancy occurred at the prior period. (File 28687–22:10, 1 May, 1920, C. M. O. 76, 1920, 14.)
9. **Officers of the Naval Reserve Force**—The laws relating to retirement in the regular Navy are not applicable to officers of the Naval Reserve Force, especially in view of the provisions of the act of 29 August, 1916, to the effect that "when not actively employed in the Navy, members of the Naval Reserve Force shall not be entitled to

any pay, bounty, gratuity, or pension except by the provisions of this act." "Retirement with pay for physical disability is not expressly provided by the act; no retired list is authorized for officers of the Reserve Force, and there is no law authorizing the President to place them on the retired list of the Navy. Officers of the Reserve Force are, however, entitled to compensation for disability resulting from injuries suffered or disease contracted in line of duty under the war-risk insurance act." (File 27231–115, J. A. G., 20 May, 1918; C. M. O. 50, 1918, 30.)

10. **Officers: Physical disability**—Officers in the permanent grades or serving under original appointments holding temporary commissions are entitled to be retired for physical disability incurred in line of duty with their temporary grade or rank held at the date of retirement. The physical disability need not have been incurred in the temporary rank held at the time of retirement. (File 26253–624:1; C. M. O. 85, 1920, 22.)
11. **Officers: With the rank of commodore, after 45 years' service**—"Officers of the Medical, Pay, Engineer Corps, chaplains, professors of mathematics, and constructors, who shall have served faithfully for forty-five years, shall, when retired, have the relative rank of commodore; and officers of these several corps who have been or shall be retired at the age of sixty-two years, before having served for forty-five years, but who shall have served faithfully until retired, shall, on the completion of forty years from their entry into the service, have the relative rank of commodore" (sec. 1481, Rev. Stat.). (File 27231–141:1, Sec. Nav., 11 Mar., 1920; C. M. O. 60, 1920, 12.)
12. **Service as midshipman since March 4, 1913, does not count.** (C. M. O. 2, 1921, 22.)

RETIREMENT OF ENLISTED MEN.

1. **Fleet Naval Reserve.** *See* NAVAL SERVICE, DEFINITION OF.
2. **Thirty years service.** *See* NAVAL SERVICE, DEFINITION OF.

RETURN RECORD TO COURT. *See* RECONSIDERATION.

REVIEWING AUTHORITY.

Action of. (C. M. O. 5, 1921, 16.)

REVISED STATUTES.

1. **Section 1420, as amended by act of 22 August, 1912 (37 Stat. 356)**—No minor under the age of 14 years, no insane or intoxicated person, and no person who has deserted in time of war from the naval or military service of the United States, shall be enlisted in the naval service. (C. M. O. 15, 1918, 18.)
2. **Section 1441**—No officer of the Navy who has been dismissed by the sentence a of court-martial, or suffered to resign in order to escape such dismissal, shall ever again become an officer of the Navy. (C. M. O. 15, 1918, 17.)
3. **Section 1624, article 19, as amended by act of 22 August, 1912 (37 Stat. 356)**—Any officer who knowingly enlists into the naval service any person who has deserted in time of war from the naval or military service of the United States, or any insane or intoxicated person, or any minor between the age of 14 and 18 years, without the consent of his parents or guardian, or any minor under the age of 14 years, shall be punished as a court-martial may direct. (C. M. O. 15, 1918, 18.)
4. **Section 1996**—All persons who deserted the military or naval service of the United States and did not return thereto or report themselves to a provost marshal within sixty days after the issuance of the proclamation by the President, dated the 11th day of March, 1865, are deemed to have voluntarily relinquished and forfeited their rights to citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any right of citizenship thereof. (C. M. O. 15, 1918, 17.)
5. **Section 1998**—Every person who hereafter deserts the military of naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six. (C. M. O. 15, 1918, 17.)

REVISION.

1. **Findings and sentence**—Court-martial order No. 309, 1919, applies with equal force to summary courts-martial as it does to general courts-martial, i. e., in neither case should the record be returned to the court for reconsideration of an acquittal or the imposition of a more severe sentence. (File 26287–7350, 30 Nov., 1920; C. M. O. 151, 1920, 15.)

2. **Immediate superior in command may not return record of summary court-martial**—The immediate superior in command may not properly return a record of a summary court-martial directly to the court for revision, as such power lies only in the convening authority. It has been held by the department, however, that somewhat the same effect can be realized by a return of the record to the commanding officer with the views of the superior expressed thereon. (C. M. O. 30, 1918, 19–20.)
3. **Records of deck courts should show clearly action in revision**—The records of certain deck courts were returned to the convening authority with directions to have the sentences entered in handwriting, as directed by Naval Courts and Boards, 1917. Entirely new records were returned to the department, and not the originals, with the proceedings in revision appended thereto. The department invited attention to section 481, Naval Courts and Boards, and added that during a revision an entirely separate record shall be kept, to which the order for reassembling must be prefixed, and which shall itself be prefixed to the record of which it is a revision. Clerical errors or omissions in the original record are not to be corrected in an informal manner by erasure or interlineation, but the legal procedure is for the proper officer to reconvene the court, calling its attention, in the order for reassembling, to the error requiring correction, and for the court, on reassembling, to decide as to the correction to be made, and to incorporate it as a part of the record of proceedings in revision. (*See* secs. 376, 377, and 456, Naval Courts and Boards.) (File 27217–4120:1, Sec. Nav., 22 Apr., 1920; C. M. O. 74, 1920, 18.)
4. **Return of record of general court-martial for.** (C. M. O. 12, 1921, 9.)

REVOCATION OF ACTING APPOINTMENT OF WARRANT OFFICERS.
Effect of. (C. M. O. 8, 1921, 19.)

REWARDS.
For suggestions of importance. *See* NAVAL RESERVE FORCE.

RIGHT OF COMMAND. *See* COMMAND.

ROBBERY.
1. **Elements of the offense**—Robbery at common law, is the feloneous taking, without bona fide claim of right, of a thing of value from the person or presence of another, against his will, by force, or by putting him in fear. The taking, although wrongful and violent, does not amount to robbery if it was in good faith under a claim of right to the specific thing taken; but the claim of right must not be a mere pretext covering an intent to steal. Therefore, when, having all the other essential elements established, an accused sets up such a claim to the specific thing, and it is not shown that he had a bona fide claim to the specific money taken by him, or that he even had reasonable grounds for entertaining such a claim, it is error to find the accused not guilty of robbery. (File 26251–13993; C. M. O. 4, 1918, 17.)
2. **Insufficient evidence.** (C. M. O. 8, 1921, 13.)

RUNNING MATES.
Illustration of its practical operation. *See* PROMOTION.

SALUTES.
1. **As between officers of the Naval Auxiliary Reserve and those of the regular Navy.** *See* NAVAL AUXILIARY RESERVE: REGULAR NAVY.

SAMOA.
1. **Detail of naval officer to civil office in.** (C. M. O. 7, 1921, 20.)

SANITY.
1. **Of witness.** *See* WITNESSES.

SCANDALOUS CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE.
1. **Improper**—It is not one of the authorized charges prescribed by the Articles for the Government of the Navy. (File 26262–7893, 3 Nov., 1920; G. C. M. Rec. 50117; C. M. O. 133, 1920, 14.)

SCANDALOUS CONDUCT TENDING TO THE DESTRUCTION OF GOOD MORALS.
1. **Stolen property in possession.** (C. M. O. 5, 1921, 16; 6, 1921, 26.)

SEA SERVICE IN GRADE.
1. **Computation of**—Under act of 29 August, 1916. (C. M. O. 114, 1919, 20.)

SECOND LIEUTENANT IN THE MARINE CORPS.

1. **Act of August 29, 1916 (39 Stat. 610-611)**—Former officers of the Marine Corps reinstated as such in different status from appointees from noncommissioned officers of the Marine Corps and civil life. (C. M. O. 37, 1916, 8.)

SECRETARY OF THE NAVY.

1. **Decisions**—The Secretary of the Navy renders decisions, not opinions. (C. M. O. 37, 1916, 6.)

SECRETS. *See also* MILITARY INFORMATION.

SEDITION.

1. **Defined**—Sedition is defined in Criminal Law as "The raising commotions or disturbances in the State; it is a revolt against legitimate authority." "No act is seditious unless its full consequences are felt over considerable area or felt by a considerable number of persons. It does not include an isolated breach of the peace. It is sufficient that the acts or words tend to produce the result. An attempt to incite mutiny in the Army or Navy is seditious." "In the United States it has been held that all publications which tend to degrade and vilify the Constitution, to promote insurrections and circulate discontent through its members, to asperse its justice and otherwise impair the exercise of its functions, are seditious, and are visited with the peculiar rigor of the law." (Bouvier's Law Dictionary, vol. 3, p. 3033, citing Erskine, Inst. 4, 4, 14.) "Sedition is conduct tending toward treason, but wanting an overt act; attempts made by meeting or speeches or by publications to disturb the tranquillity of the State which do not amount to treason. All contempts against the sovereign and the Government, and riotous assemblies for political purposes, may be reckoned under the head of sedition." (American and English Encyclopedia of Law, "Sedition," citing Republica *v.* Dennie, 4 Yates(Pa.) 270.) (File 26262-3739, J. A. G., 5 Jan., 1918; C. M. O. 4, 1918, 16.)

SELECTION. *See* SELECTION BOARD; PROMOTION.

1. **Promotion**—By selection of officer of Staff Corps. (C. M. O. 3, 1917, 7.) *See* PROMOTION BY SELECTION.

SELECTION BOARD.

1. **For temporary officers**—Convened for the purpose of selecting candidates to fill the vacancies in the permanent Marine Corps has the authority to recommend to the Secretary of the Navy the precedence of all officers transferred and appointed to the Marine Corps under the provisions of the act of 4 June, 1920. (File 29226-1, J. A. G., 2 Aug., 1920; C. M. O. 115, 1920, 18.)
2. **Laws governing recommendations for temporary promotion.** *See also* PROMOTION.
3. **Members holding ad interim commissions, rights of.** *See* COMMISSIONS.

SELECTION FOR PROMOTION.

1. **Date fixing eligibility therefor under the four years' service clause**—Captains, commanders, and lieutenant commanders who will have served four years in their present grade by November 30 next after the convening of the board for selection for promotion are eligible for consideration thereby, notwithstanding the fact that at the time of such consideration they shall not have served four years in their present grade. (Op. Atty. Gen., 14 July, 1917; C. M. O. 46, 1919, 24.)

SELECTIVE SERVICE LAW.

1. **Cessation of exemption**—One who, having been posted by the local board of the community in which he registered under the selective service law of 18 May, 1917, secures exemption in due form because of his employment at the time of posting as a mechanic in the Naval Gun Factory and who thereafter quits his employment in such gun factory and enlists in the Navy, will be discharged therefrom and instructed to report to his local board in order that he may fulfill his obligations under the law aforesaid, his said exemption ceasing to be effective when the cause therefor is removed. (File 28798-202, J. A. G., 31 Oct., 1917; C. M. O. 67, 1917, 20.)
2. **Operation as to voluntary enlistment**—One who has been posted by his local board under the operation of the selective service law, but who enlists in the naval service subsequent to such posting, but prior to receiving actual notification of the same, will be discharged from the naval service in order that he may satisfy his obligations under such law. (File 28798-125, J. A. G., 18 Sept., 1917; C. M. O. 58, 1917, 13.)

SELF-CHALLENGE. *See* CHALLENGES.

SELF-DEFENSE.

1. **As defense to charge of assault**—Mere words by a person who has a revolver which is not in his physical possession but is in a ditty-box and out of commission by reason of lack of ammunition, do not constitute sufficient grounds for a reasonable belief on the part of another that he is in such imminent danger of bodily harm that he is justified in attacking in self-defense. To invoke the doctrine of self-defense, an accused must show that there was some actual attempt or offer to do bodily harm, or that his act of self-defense was preceded by an outward or material assault. Words or threats alone are not sufficient to provoke in return an act of legitimate self-defense. (File 26251-13993; C. M. O. 4, 1918, 17.)

SELF-INCRIMINATION. *See* CONSTITUTIONAL RIGHTS OF ACCUSED.

1. **This defense must be pleaded in person**—A counsel for an accused sought to question a witness for the prosecution as to whether or not he testified in a certain manner in a preceding case. The judge advocate claimed for him the privilege of refusing to answer on the grounds of self-incrimination. The court sustained the objection. *Held*, the privilege of a witness to decline to answer a question on the ground that his answer might tend to incriminate him is personal and can be taken advantage of by himself alone. (Naval Digest, 1916, p. 568, sec. 16; Naval Courts and Boards, 1917, pp. 162-165; C. M. O. 30, 1918, 24.)

SELF-SERVING STATEMENT.

1. **May be objected to.** (C. M. O. 2, 1917, 2.)

SELLING AND STEALING GOVERNMENT PROPERTY.

1. **Distinct offenses**—And may be separately charged. (C. M. O. 72, 1917, 15.)

SENIOR OFFICER PRESENT.

1. **As between officers of the Naval Auxiliary Reserve and those of the regular Navy.** *See* NAVAL AUXILIARY RESERVE: REGULAR NAVY.
2. **Jurisdiction of, to order summary courts**—A senior officer present can not legally order summary courts-martial upon members of the armed guard detail in foreign waters, the members of said detail not being under the command of said senior officer present. (File 26504-335, J. A. G., 19 July, 1918; C. M. O. 92, 1918.)

SENIORITY. *See* PRECEDENCE; SUPERIOR OFFICER.

SENTENCE. *See also* PROBATION.

1. **Abbreviations in, are improper.** *See* ABBREVIATIONS.
2. **Accessories**—When sentence provides for no term of confinement, accessories should not be added. (C. M. O. 177, 1919.)
3. **Adequate**—Duty of court to adjudge. (C. M. O. 35, 1920, 20.)
4. **Alias.** *See* ALIAS.
5. **Army**—"Conduct unbecoming an officer and a gentleman." *See* ARMY.
6. **Diminished rations**—Where such sentence is adjudged, the convening authority should set out in his action the exact amount of rations to be allowed. (File 28267-6847, Sec. Navy, 5 Aug., 1920; C. M. O. 115, 1920, 13.)
7. **Commutation and mitigation.** (C. M. O. 9, 1921, 12.)
8. **Dismissal in time of war**—Does not carry with it loss of citizenship, as incorrectly stated by counsel. (C. M. O. 30, 1920.)
9. **Dismissal of former officers of Reserve Force.** (C. M. O. 9, 1921, 13.)
10. **Execution of**—In case of a sentence involving loss of pay, the date from which the execution of such sentence begins is the date of approval by convening authority. (C. M. O. 141, 1919.)
11. **Hard labor**—A recommendation that the hard labor adjudged be remitted was disapproved on the ground that such labor means the usual labor which all prisoners are expected to perform. (C. M. O. 78, 1917, 2.)
12. **Illegal.** *See* REDUCTION IN RATING.
13. **Same**—Reduction of warrant officer to enlisted rating for offenses other than those specifically mentioned in the law. (C. M. O. 31, 1919.)
14. **Same**—Reduction of officers in grade, as from captain to lieutenant, is * * * unknown to our law. (Winthrop's Military Law and Precedents, p. 660; C. M. O. 93, 1918.)
15. **Improper.** (C. M. O. 7, 1921, 15.)
16. **Improper mitigation of.** (C. M. O. 7, 1921, 15.)

17. **Confinement: Date from which, commences when not specified**—An officer having been sentenced to dismissal and confinement, and such sentence having been confirmed by the President without specifying the date from which the period of confinement should commence to run, the question was presented whether such period of confinement should be reckoned from the date the sentence was confirmed by the President or from the date of approval of the proceedings, findings, and sentence by the convening authority. The department held that the period of confinement should be reckoned from the date the sentence was confirmed by the President. (File 26262–5506:6, Sec. Navy, 24 May, 1919; C. M. O. 186, 1919, 47.)
18. **Illegal**—Convening authority can not approve. (C. M. O. 304, 1919, 12.)
19. **Including loss of pay and reduction in rating.** (C. M. O. 10, 1921, 10.)
20. **Incongruous**—Loss of pay and dismissal. (C. M. O. 65, 1919.)
21. **Increase of**—Record returned by convening authority—"The return of a naval case to a naval court for reconsideration of an acquittal, or to impose a more severe sentence upon a conviction, is in direct contravention of the published policy of the President of the United States and of the policy of the department, as set forth in Court-Martial Order 309, 1919." (C. M. O. 61, 1920.)
22. **Increasing severity of**—No authority will return record for that purpose. (C. M. O. 309, 1919, 2).
23. **Ineffective form**—A lieutenant (junior grade) in the United States Naval Reserve Force was sentenced to be placed at the foot of the list of ensigns, United States Naval Reserve Force. *Held*, That the sentence was incongruous, in that by the wording of the sentence, the officer is not reduced in rank. A sentence should be construed with exactness, nothing being implied or read into it. The sentence adjudged in this case does not provided for the reduction or even disenrollment of the officer from the rank of lieutenant (junior grade) to that of ensign, but places him at the foot of ensigns. He would, therefore, still hold the provisional enrollment of a lieutenant (junior grade) and be entitled to the pay thereof, but for the purposes of precedence would be at the foot of the list of ensigns. The sentence is to a certain extent indeterminate, in view of the fact that at the present time there appears to be no list maintained showing the relative rank or position of officers serving under provisional enrollment in the Naval Reserve Force. Consequently, being placed at the foot of a nonexisting list is without effect. The sentence was disapproved. (C. M. O. 20, 1918, 2.)
24. **Irregular.** (C. M. O. 8, 1921, 14.)
25. **Same**—"To be confined for a period of * * * and then to be dismissed * * * ." Not in accordance with section 339, Naval Courts and Boards, 1917, since the dismissal should always be prior to the imprisonment. (C. M. O. 145, 1919.)
26. **Irregular and undesirable.** (C. M. O. 7, 1921, 15.)
27. **Lenient**—"Only to the youth and inexperience of the court, composed of the only officers available for duty in this district, can their action in imposing such a lenient sentence for such a nefarious offense be ascribed." (C. M. O. 212, 4, 1919.)
28. **Limitation of when deposition is introduced.** (C. M. O. 7, 1921, 14.)
29. **Loss of numbers.** *See also* LOSS OF NUMBERS.
30. **Same**—Becomes fully executed upon promotion of officer so sentenced—In the case of an officer who, while in the grade of ensign, was sentenced to a loss of numbers, and who subsequently was promoted to the grade of lieutenant (junior grade) and now requests that he be restored to his "former position in the service" said officer was informed that he now occupies in the grade of lieutenant (junior grade) the place to which the date of his present commission entitled him, and that the sentence to loss of numbers has been completely executed. Accordingly, to restore said officer to his former relative position would require that he be placed above other officers whose present commissions antedate his own; and the President, under existing law, is authorized so to advance an officer only for eminent and conspicuous conduct in battle or extraordinary heroism. (File 26261–246:1, Sec. Navy, Mar. 18, 1914; 26261–246:2; Sec. Navy, Dec. 8, 1916; File 26262–1794:1, Sec. Navy, Dec. 21, 1916; C. M. O. 46, 1916, 8.)
31. **Loss of pay.** *See* PAY.
32. **Same**—A reviewing authority, in acting on the case, reduced the loss of pay fixed by the sentence to $200, remitted the confinement and dishonorable discharge awarded, upon the condition that the accused maintain a satisfactory record for a period of six months, otherwise the sentence to be carried into effect at any time during that

period. This action creates the possibility that a man may be confined for misconduct within the period of six months; the loss of pay, however, is in a fixed amount and will have been checked, and further checkage would not be lawful. We are then confronted with the anamalous condition of a man undergoing sentence of confinement on full pay. Such a situation is contrary to the policy of the department and consequently any action which holds in abeyance the term of confinement should be made to affect similarly the loss of pay involved. (File 26262-3076, J. A. G., July 20, 1917; C. M. O. 46, 1917, 19.)

33. **Mitigation.** *See also* MANUAL FOR THE GOVERNMENT OF U. S. NAVAL PRISONS, ETC.
34. **Same**—Conditions under which it should be considered a nullity. In a fleet general court-martial case recently reviewed, it was noted that the convening authority mitigated the sentence in accordance with articles 114 to 122, inclusive, of the Manual for the Government of U. S. Naval Prisons. As the charge of which the accused was found guilty was one involving moral turpitude, the mitigation prescribed by the convening authority was held to be a nullity. *See* C. M. O. 141, 1918, 22. (File 26262-6424, J. A. G., 14 May, 1919; C. M. O. 186, 1919, 26.)
35. **Mitigation of, in accordance with Manual for Government of Naval Prisons**—Article 114 of the Manual for the Government of Naval Prisons divides men undergoing confinement pursuant to sentence of general court-martial into two classes, to wit: (*a*) Criminals; those guilty of acts involving moral turpitude which would be punishable by a term in prison if the offender were a civilian; and (*b*) naval prisoners, comprising offenders convicted of strictly military offenses. Articles 115 to 122, inclusive, of the said manual apply only to those in status (*b*). The sentence of an accused in class (*a*) above mentioned was mitigated by the convening authority. The department held that the mitigation prescribed was a nullity. (File 26262-4793; G. C. M. Rec. No. 39301; C. M. O. 141, 1918, 23.)
36. **Same**—Of sentence involving loss of pay should hold loss of pay in abeyance. (C. M. O. 46, 1917, 19.)
37. **Same**—In cases of desertion in time of war, so as to make possible his restoration to duty, is improper. *See* DESERTION.
38. **Same.** (C. M. O. 5, 1921, 16.)
39. **Petty officers serving**—A court in adjudging the sentence made the part relating to reduction in rating follow that relating to confinement. The sentence was thus rendered ambiguous, in that it might be held that the reduction in rating would not occur until after the term of confinement had been served. The policy of the department in regard to petty officers serving prison sentences is set forth in Naval Digest, 1916, page 518, sections 36 and 37. In such cases the form of sentence set forth in Naval Courts and Boards, 1917, section 348, should be followed in order to prevent uncertainty. (File 26251-16248, Sec. Nav., 1 May, 1918; G. C. M. Rec. No. 37994; C. M. O. 50, 1918, 18.)
40. **Publicly stripped of the insignia of his rank; dismissed and confined**—Officer sentenced to be, as confirmed. (C. M. O. 220, 1919.)
41. **Publicly stripped of the insignia of his rank; dismissed and confined**—Warrant officer. (C. M. O. 222, 1919.)
42. **Reduction in rating**—Revocation of provisional appointment inplied from court's language. (C. M. O. 177, 1919.)
43. **Reduction of officer to enlisted rating, confirmed.** (C. M. O. 185, 1919.)
44. **Remitted improperly**—An enlisted man was sentenced by a naval court-martial to be confined for a period of one year, then to be dishonorably discharged from the United States naval service, and to suffer all the other accessories of said sentence as prescribed by the Navy Regulations, namely, the loss of pay during his current enlistment except the sum of $3 per month during confinement and $20 on discharge (Navy Regulations, 1913, R-816 (5)). The convening authority remitted the confinement and dishonorable discharge without at the same time remitting any part of the loss of pay. This in effect would mean that the accused be required to serve during the remainder of his enlistment without pay.

    Held, That convening authorities in acting upon general court-martial cases of this kind should not remit the confinement without remitting the loss of pay in whole or in part. (File 26262-2742:1, 1917, G. C. M. Rec. No. 33050; C. M. O. 3, 1917, 5.)
45. **Remitted portions**—A convening authority unconditionally remitted all but three months of a period of confinement adjudged, and remitted the dishonorable discharge subject to a year's probation, and then stated that if the probation is broken the original sentence will be executed. *Held*, That a sentence can not be unconditionally

remitted in part with subsequently attached conditions to become operative as to the part unconditionally remitted, in the event of a breach of probation. The convening authority's power to affect that portion of the sentence which he unconditionally remitted ceased on the remission thereof. (File 26262–7786, J. A. G., 1 Oct., 1920; G. C. M. Rec. No. 49995; C. M. O. 119, 1920, 13.)

46. **"Restriction to the limits of the ship" not authorized for summary courts-martial**—An accused was sentenced inter alia "To be restricted to the limits of the ship for a period of thirty days." *Held*, it was not one of the punishments which a summary court-martial is authorized to adjudge and therefore set aside. (A. G. N. 30; C. M. O. 21, 1910, 17; 1, 1911, 3; 33, 1914, 4–6; Index-digest, 1914, p. 38. File 26287–3315, Sec. Navy, Feb. 15, 1916; C. M. O. 5, 1916, 6.)
47. **Revocation of temporary appointment**—Officer. (C. M. O. 111, 1920.)
48. **Seaman, third class, not established rating.** (File 26262–4860, Sec. Nav., 20 Aug., 1918; G. C. M. Rec. No. 39462; C. M. O. 114, 1918, 23.)
49. **Unauthorized.** (C. M. O. 10, 1921, 10.)
50. **Unauthorized confinement.** (C. M. O. 7, 1921, 11.)
51. **Uniform throughout the service**—It is necessary and desirable that general courts-martial be guided, in adjudging sentences, by the approved sentences as published in Court-Martial Orders, which "have full force and effect as regulations for the guidance of all persons in the naval establishment." The reason for this is that it is necessary to maintain an even administration of justice throughout the service, which can only be done by the department in equalizing sentences by mitigation, a policy which can not be made effective unless adequate and more or less equal sentences be adjudged for like offenses. (File 26251–23517, J. A. G., 13 May, 1920; G. C. M. Rec. No. 47720; C. M. O. 76, 1920, 21.)

SERVICE.

1. **In a civil capacity can not be counted as previous service in the Army, Navy, or Marine Corps.** (C. M. O. 2, 1921, 21.)
2. **Continuous Service Pay.** *See* FLEET NAVAL RESERVE FORCE.
3. **In the Naval Academy and United States Army may be counted for retirement.** (C. M. O. 209, 1919, 26.)
4. **Of enlisted man as temporary warrant officer**—The time served as temporary boatswain by an enlisted man of the Navy may be credited to and counted as service in the grade of boatswain in computing the six years' service required for promotion to chief boatswain, under the provisions of the act of 27 April, 1904 (33 Stat. 346). (File 17789–87, J. A. G., 5 May, 1920; C. M. O. 76, 1920, 16.)
5. **Of reservists for entry into Naval Academy.** *See* NAVAL RESERVE FORCE.
6. **Sea**—Actual on seagoing ships, within meaning of law. (C. M. O. 186, 1919, 28).
7. **Voluntary service can not be accepted.** *See* VOLUNTARY SERVICE.
8. **Of process and administering oath of same**—By and on persons in Navy—Under paragraph 18 of General Order No. 121 of 17 September, 1914, commanding officers are authorized to permit service of process upon persons in the naval service and to grant leave of absence to persons upon whom such process has been served in order to permit them to appear at the trial, unless the public interests would be seriously prejudiced by their absence.

   But for a commanding officer personally to make serivce or to select some one else to make such service, or to administer an oath that such service was made, would be contrary to the department's practice, and the administering of the oath of doubtful legality under the act of 4 March, 1917 (39 Stat. 1171), whch authorizes commanding officers to administer oaths only for naval purposes. (File 26524–716, Sec. Navy, 12 Feb., 1919; C. M. O. 77, 1919, 25.)

SERVICE RECORDS.

1. **Are proper evidence only when made by proper officer**—While "service records" are such documents as may properly be admitted in evidence, entries therein, however, must be made by or under the direction of the officer whose duty it is to make same. The proper officer to make the entries in the service record of an accused is his commanding officer at the time of the alleged desertion. *Held*, That the entries in the service record of an accused relative to his alleged absence were not competent evidence against him, because they were not made by his commanding officer. (File 26251-16947, B; G. C. M. Rec. No. 39429; C. M. O. 141, 1918.)

SET ASIDE.

1. **Proceedings in revision**—Rendered illegal by failure of convening authority to sign letter returning case for revision; such proceedings were set aside by the department. (C. M. O. 39, 1919.)

SICKNESS.

1. **Absence from duty**—On account of sickness resulting from misconduct—Construction of provision of act of August 29, 1916, relating thereto. (C. M. O. 3, 1917, 6.) *See* ABSENCE.

SIGNATURE.

1. **On commissions may be that of the Secretary but the act must be that of the President.** *See* COMMISSIONS.

SODOMY.

1. **Attempt to commit sodomy**—It is competent for the court to find the accused persons guilty of the included offense of attempting to commit any crime charged, should the evidence not be sufficient to sustain a finding of guilty of the charge. (File 23103; 22, J. A. G., 16.)
2. **Definition of**—Sodomy, in its broadest meaning, is the carnal copulation by human beings with each other against nature or with a beast, in which sense it includes the crime against nature, bestiality and buggery. In its narrower sense sodomy is the carnal copulation between two human beings per anum (36 Cyc. 501). In the Navy, the latter is the accepted definition in cases tried by courts-martial. Penetration is a necessary element of the offense.

SPECIFICATIONS. *See* CHARGES AND SPECIFICATIONS.

1. **Amendment of**—Must contain all material averments necessary to support charge. (C. M. O. 186, 1919, 27.)
2. **As found proved must allege an offense to sustain a conviction.** (C. M. O. 11, 1921, 12.)
3. **Deck court must allege an offense.** (C. M. O. 10, 1921, 9.)
4. **Defective.** (C. M. O. 12, 1921, 11.)
5. **Defects in, waived by plea.** (C. M. O. 77, 1919, 17.)
6. **Each specification must support the charge.** (C. M. O. 9, 13; 12, 11; 1921.)
7. **Fatally defective, example of.** (C. M. O. 5, 1921, 12.)
8. **Multifarious.** (C. M. O. 12, 1921, 12.)
9. **Must allege an offense.** (C. M. O. 4, 1921, 11.)
10. **Must support charge.** (C. M. O. 209, 1919, 17.)
11. **No offense alleged.** (C. M. O. 7 (14); 12 (13); 1921.)

SQUADRON COMMANDERS.

1. **Commanders or above may command as rear admirals.** *See* COMMAND, FLEETS AND SQUADRONS.
2. **In time of war, retired commanders or above may command as rear admirals.** *See* COMMAND, FLEETS AND SQUADRONS.

STAFF CORPS.

1. **Command in line by officers of.** (C. M. O. 6, 1921, 11.)
2. **Advancement in rank without change in office and advancement in office with or without change in rank.** *See* PROMOTION BY SELECTION.
3. **Permanent and temporary promotions.** *See* PROMOTIONS.
4. **Regular Navy and Naval Reserve Force—Seniority**—The act of 29 August, 1916, provides that officers of the Naval Reserve Force shall rank with but after officers of corresponding rank in the Navy. Nevertheless, it is held that a passed assistant surgeon, United States Naval Reserve Force, with the rank of lieutenant, is senior to an assistant surgeon, United States Navy, with the rank of lieutenant, because the office of passed assistant surgeon in the Medical Corps is higher than that of assistant surgeon, and it was evidently not the intention of Congress to give the work "rank" a limited and narrow meaning, thereby overturning established precedents. (File 11130-40:1, J. A. G., 20 Dec., 1917; C. M. O. 88, 1917, 18.)
5. **Transferred and appointed to a permanent grade or rank**—The board convened in accordance with the provisions of the act of 4 June, 1920, for the purpose of recommending their precedence, may legally be convened at any time. (File 11130-72, J. A. G., 16 July 1920; C. M. O. 101, 1920, 26.)

STATEMENT.

1. **Of accused**—Should not be confused with argument of counsel. *See* COUNSEL.

STATEMENT INCONSISTENT WITH PLEA.

1. **Case disapproved.** (G. C. M. Rec. No. 39636; G. C. M. Rec. No. 39328; C. M. O. 114, 1918, 29.)
2. **Material error**—For court not to proceed in accordance with sections 310 and 312, Naval Courts and Boards, 1917. (C. M. O. 2, 1919.)
3. **Notwithstanding plea of guilty to offenses made punishable by statute regardless of intent**—(C. M. O. 53, 1919, 31.)

STATEMENT OF ACCUSED.

1. **Error**—Where statement of accused is clearly inconsistent with his plea of guilty, it is material error not to proceed in accordance with sections 310 and 312, Naval Courts and Boards, 1917. (C. M. O. 6, 1919.)
2. **Inconsistent with plea.** (C. M. O. 7 (11); 9 (13); 11 (8); 1921.)
3. **Officer**—The accused being an officer in the service is presumed to have sufficient intelligence to be fully cognizant of the nature of his pleas, and the statement made in connection therewith, and, furthermore, as he was represented by counsel, it must be assumed he was properly advised. (C. M. O. 6, 1919.)
4. **Weight to be given to.** (C. M. O. 12, 1921, 13.)
5. **When accused does not desire to make a statement**—Record should show affirmatively. (C. M. O. 126, 1919.)

STATUTES AT LARGE.

1. **Act of 22 August, 1912 (37 Stat. 356)**—That section 1998 of the Revised Statutes of the United States be, and the same is hereby, amended to read as follows: "Sec. 1998. That every person who hereafter deserts the military or naval service of the United States, or who, being fully enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six of the Revised Statutes of the United States: *Provided*, That the provisions of this section and said section nineteen hundred and ninety-six shall not apply to any person hereafter deserting the military or naval service of the United States in time of peace: *And provided further*, That the loss of rights of citizenship heretofore imposed by law upon desertion from the military or naval service may be mitigated or remitted by the President where the offense was committed in time of peace and where the exercise of such clemency would not be prejudicial to the public interest * * *." (C. M. O. 15, 1918, 17.)
2. **Act of February 16, 1914, section 21 (38 Stat. 382, 290)**—That the President may also commission or warrant as of the highest rank formerly held by him, or the present equivalent of such former rank in case the nomenclature of some of the specific duties of the same may have been changed, any person who having been formerly a commissioned or warrant officer of the United States shall have been honorably discharged from the service * * *." (C. M. O. 15, 1918, 17.)
3. **Act of August 29, 1916 (39 Stat. 556, 589)**—All former officers of the United States naval service, including midshipmen, who have left that service under honorable conditions, and those citizens of the United States who have been, or may be entitled to be honorably discharged from the naval service after not less than one four-year term of enlistment or after a term of enlistment during minority, and who shall have enrolled in the Naval Reserve Force shall be eligible for membership in the Fleet Naval Reserve. (C. M. O. 15, 1918, 17.)

STATUTES.

1. **Interpretation.** *See* INTERPRETATION OF STATUTE.

STATUTE OF LIMITATIONS.

1. **An officer convicted five years subsequent to his offense and the preferring of charges and specifications.** *See* DESERTION.
2. **Plea in bar of trial**—A court sustained a plea in bar of trial on the ground that the statutes of limitations had run as to one of the three specifications. On the remaining two specifications the accused was found guilty. (C. M. O. 28, 1917.)

STEALING AND SELLING GOVERNMENT PROPERTY.

1. **Distinct offenses**—May be separately charged. (C. M. O. 72, 1917. 15.)

STRAGGLER.

1. **Checkage against his account the cost of transportation.** *See* CHECKAGE.
2. **Surrender and delivery at recruiting station.** *See* DESERTERS.

SUBSISTENCE.
1. **Allowances, can not be changed without the act of Congress**—An act of Congress would be necessary to change the limitation of $5 per day, for subsistence of officers of the Navy when traveling under orders, contained in Article R–4495 (15) (*a*) and (*b*) Navy Regulations, 1913. (File 3980–1426, J. A. G., 23 Mar. 1918; C. M. O. 30, 1918, 31.)

SUBSTITUTE.
1. **Court should, words properly descriptive of offense.** (C. M. O. 316, 1919, 3.)

SUBSTITUTIONS.
1. **In the findings of the court.** *See* FINDINGS.
2. **Precept:** Substitution in precept not authorized by document modifying same. (C. M. O. 82, 1917, 3.)

SUGGESTIONS.
1. **Rewards for beneficial.** *See* NAVAL RESERVE FORCE.

SUICIDE.
1. **Attempted.** *See* ATTEMPTED SUICIDE.
2. **Line of duty.** *See* LINE OF DUTY AND MISCONDUCT CONSTRUED.

SUMMARY COURTS-MARTIAL.
1. **Convening authority as member or recorder**—It is decidedly improper, though not illegal, for a convening authority who is senior officer present to order himself as senior member of a summary court-martial even under the circumstances that there are not a sufficient number of officers present to constitute the court. (File 26287–4130, J. A. G., 10 Aug., 1917.) The detailing of himself by such senior officer present as recorder under the conditions predicated would not be open to the same objection. (C. M. O. No. 53, 1917, 13.)
2. **Eligibility of officer of Naval Militia to serve as recorder of**—An officer of the Naval Militia, not in active service under call of the President, but attached to a command for "routine practical instruction" only, may not be ordered to act as recorder of a summary court-martial. (File 26287–3802, Sec. Navy, 15 Mar., 1917; C. M. O. 22, 1917, 11.)
3. **Illegal sentence.** (C. M. O. 9 (14); 10 (10), 1921.)
4. **Irregular procedure.** (C. M. O. 10, 1921, 10.)
5. **Jurisdiction.** *See* JURISDICTION.
6. **Jurisdiction of.** (C. M. O. 8, 1921, 14.)
7. **May be convened by officers of the National Naval Volunteers.** *See* ADMINISTRATION OF NAVAL DISCIPLINE.
8. **Members.** *See* MEMBERS OF COURTS-MARTIAL.
9. **Members may be required to divulge their votes.** *See* MEMBERS OF COURTS-MARTIAL.
10. **Power to convene**—Commanding officer of a ship may convene a summary court-martial as such, but if he is also the commanding officer of a flotilla, he may not convene a summary court-martial in the latter capacity to try members of his command. (File 26287–7177, 17 Nov., 1920; C. M. O. 133, 1920, 15.)
11. **Procedure in case competency of witness is questioned**—A summary court-martial would be justified in exercising its discretion as to whether or not a witness before it, whose competency is questioned, should be required to withdraw pending the taking of testimony by it as to such competency; its decision either way would not invalidate the proceedings. *See* WITNESSES. (File 26267–163, J. A. G., 9 Apr., 1917; C. M. O. 32, 1917, 7.)
12. **Return of record for revision of sentence.** (C. M. O. 12, 1921, 14.)
13. **Revision directed by immediate superior in command.** *See* REVISION.
14. **Status of members as to votes on finding and sentence**—The department considers the confidential nature of the vote or opinion of each member of a summary court-martial to be sacred in all cases except where offical inquiry is made by the convening or higher authority. (File 25675–9–10–11, Sec. Navy, 28 Oct., 1915.) Although * * * the conclusion has been established that under certain circumstances the members of a summary court-martial may be required to divulge their votes to proper higher authorities, a case justifying disciplinary action of any nature against any such member on account of the finding or sentence of the court would have to show in a convincing manner that he had not been guided properly by the evidence adduced or the laws for the Government of the Navy, these requirements being imposed by his oath equally with the mandates of his conscience. (File 26287–4045, Sec. Navy, 28 July, 1917; C. M. O. 46, 1917, 20.)
15. **Unauthorized sentence.** (C. M. O. 12, 1921, 15.)

SUPERIOR OFFICER.

1. **Definition**—Term "superior officer" includes an officer "superior in rank" and does not require association on duty in the hierarchy of command. (C. M. O. 5, 1917, 9.)
2. **Does not include Army officers**—An enlisted man of the Navy was charged with assaulting and striking his superior officer, the officer in question being an Army officer. *Held*, That an Army officer is not a superior officer within the meaning of article 4 of the Articles for the Government of the Navy, or article 64, United States Navy Regulations. The commonly accepted meaning of the words "superior officer" contemplates officers within the same service, and although the Army officer in question was a member of the military police on duty and chargeable with the maintenance of order, nevertheless he comes within the status of any civil or military official maintaining the public peace and does not come within the meaning of "superior officer" which would support the charge of "assaulting and striking his superior officer" as when such assault was committed by a person of inferior rank or rating in the Navy upon another of higher rank or rating in the same service. Therefore the offense committed in this instance was not a disorder properly chargeable under the specific charge "assaulting and striking his superior officer" but comes under the provisions of section 67, Naval Courts and Boards, 1917, which directs that when the neglect or disorder is not specifically provided for it shall be charged under one of the general or catch-all clauses, and in this case "conduct to the prejudice of good order and discipline" would have been the proper charge. (File 26262-6324, 21 May, 1919; G. C. M. Rec. No. 43533; C. M. O. 119, 1920, 13.)
2. **Lawful order**—Of superior officer, what constitutes. (C. M. O. 57, 1917, 2-3.) *See* COMMAND.
3. **Right to command.** *See* COMMAND.
4. **Seniority on Navy list, what constitutes seniority**—An accused was charged with libeling his "superior officer." It is contended that the officer was not his superior, because they were each on widely different stations, performing dissimilar duty; that mere seniority on the Navy list does not convey superiority. *Held*, That officer superior in rank is his superior officer within the intent of the Navy Regulations and section 1784 of Revised Statutes, and that the term does not require association on duty in the hierarchy of command. (C. M. O. 5, 1917, 9.)

SUPERIOR PROVOST COURT. *See also* COURTS, EXCEPTIONAL MILITARY; MILITARY COMMISSIONS; PROVOST COURTS.

1. **Conduct of, when convened by naval authority**—Superior provost court should, in general, correspond to a summary court-martial both as to its constitution and to its proceedings. Except where the convening authority for military reasons may direct otherwise, evidence introduced before such court shall be recorded. A superior provost court ordinarily should not be granted authority to impose sentences involving confinement for more than five years nor fines of more than $3,000. (C. M. O. 5, 1917, 8.)

SUPPLIES.

1. **Contracts for by Reservists.** *See* NAVAL RESERVE FORCE.

SURGEON. *See* MEDICAL CORPS.

SURGICAL OPERATIONS.

1. **May and may not be compellable**—"One in the naval service may not, against his will, be ordered to submit to an operation which is dangerous to life or limb, whereas he may be ordered to submit to an operation which would correct a condition which destroys his usefulness, when such operation may fairly be said, by a responsible medical officer, to be of such a character as not to endanger the life or limb of the patient, under the conditions existing at the time of the operation or under the conditions which were believed then to exist and which an experienced medical officer would, in the exercise of due care, be justified in believing to exist. If, as a matter of fact, a disability results from an incident of the service, and is of such serious character that, under the circumstances indicated, a person in the service may properly decline to be operated upon, it would seem to follow obviously that such person is entitled to a finding of 'in line of duty.' It seems to follow equally clearly that where one may properly be ordered to submit to operation, as above set forth, and is punishable for failure so to submit, the notation of record 'not in line of duty, due to his own misconduct' correctly reflects the facts. Should the disability in question be a 'sickness or disease' continuing to exist as a result of his failure to submit to operation, then it would appear that the loss of pay prescribed by the act of August 29, 1916, would properly attach." (File 7036-382, J. A. G., Nov. 9, 1917; C. M. O. 72, 1917, 18.)

SURPLUSAGE.
1. **Definition and effect of.** (C. M. O. 2, 1921, 19.)
2. **In specifications, warrants return of record to the convening authority.** (C. M. O. 2, 1921, 19.)

SURRENDER.
1. **Of deserters.** *See* DESERTERS.

SUSPENSION FROM PROMOTION AND LOSS OF NUMBERS UNDER SECTION 1505, REVISED STATUTES, AS AMENDED BY THE ACT OF MARCH 11, 1912. (C. M. O. 4, 1921, 20.)

TAX.
State income—liability of naval officers—If an officer is a legal resident of the State, he is liable to pay a tax on his income; but his salary as an officer of the United States is not taxible. If he is not a legal resident of the State, but happens to be within its boundaries on official duties under orders, no part of his income is taxable by reason of having been within the territorial limits of the State under proper orders of the Navy Department, and as its representative. (File 28472–47, J. A. G., 15 May, 1918; C. M. O. 50, 1918, 30.)

TEMPERMENTAL CHARACTERISTICS.
Qualifications for promotion. *See* PROMOTION.

TEMPORARY APPOINTMENT.
1. *See* APPOINTMENTS, TEMPORARY.
2. **Continuance of.** (C. M. O. 7, 1921, 20.)

TEMPORARY COMMISSIONS.
1. *See also* MARINE CORPS.
2. *See* MEDICAL CORPS, PROMOTION, COMMISSION.

TEMPORARY WARRANTS OR COMMISSIONS.
Effect on continuous service. *See* CONTINUOUS SERVICE.

TESTIMONY.
Nature of required by the oath taken by witnesses. *See* OATH. (C. M. O. 304, 1919, 17.)

TESTIMONY OF ACCOMPLICE.
Weight to be given—In the absence of a statute the credibility of an accomplice is for the jury. No common-law rule forbids a conviction upon the uncorroborated testimony of an accomplice, if such evidence satisfies the jury of the guilt of the accused beyond a reasonable doubt. Nevertheless, the uncorroborated testimony of an accomplice should be received and considered by the jury with caution, and the court should, and usually does, instruct them to that effect. (12 Cyc. 445, 446, and 455.) (File 26251-16163; G. C. M. Rec. No. 39204; C. M. O. 114, 1918, 29.)

TESTIMONY OR STATEMENT OF ACCUSED.
Rule for determining if inconsistent with plea of guilty and procedure to be followed if in doubt—In order to adjudge a statement of accused inconsistent with a plea of guilty it must be clear that the assertion embraced in the former would be sufficient, if conclusively proved by evidence, to have been grounds for acquittal of the charge or charges to which he had pleaded guilty. A mere contradictory statement, not sufficient in character to meet this requirement, should not be recognized as such an inconsistency as to necessitate disapproval of findings in the event of the court's not following the procedure laid down in naval courts and boards, section 310, which provides for a substitution of plea. Whereas, if any doubt is raised regarding the inconsistency of the testimony or statement of an accused with his plea on arraignment and there is reason to believe that his averments are made in good faith, the department rules that the ends of justice suggests that the accused be properly instructed in the premises and a new plea entered; when this is not done it devolves upon the reviewing authority to decide whether such failure warrants disapproval and this is determined upon considering all the attending circumstances in each particular case. (File 26262-4604; G. C. M. Rec. No. 38848; C. M. O. 114, 1918, 30.)

THEFT.

1. **Charge of, not supported by specification alleging receipt of stolen goods**—Reference to the Criminal Code of the United States shows that larceny (theft) and receiving stolen goods are made separate and distinct offenses (secs. 287 and 288). From this it is evident that a specification which sets forth that the accused received stolen goods can not be held to support the charge of theft. (Naval Digest, 1916, p. 67, sec. 74, and p. 68, sec. 92.) (File 26262-4937, G. C. M. Rec. No. 39734; C. M. O. 114, 1918, 25.)
2. **Corpus delicti must be proved.** (C. M. O. 8, 1921, 15.)
3. **Unlawful taking of automobile for "joy ride" does not constitute**—The term "Felonious intent" as used in relation to larceny, means an attempt to deprive the owner not temporarily, but permanently, af his property (*see* State *v.* Shepard, 63 Kans. 5454). The facts in this case tended to show that the automobile was taken for a "joy ride," rather than for the purpose of depriving the owner permanently of his property. The department, therefore, disapproved the findings of the court on the charge of "theft" entered against the accused. (File 26262-5217, G. M. C. Rec. No. 40422; File 26262-5216, G. C. M. Rec. No. 40443: C. M. O. 174, 1918, 20.)
4. **Debts**—Threat if not paid. (File 26251-12159, p. 16.)

"THROUGH NEGLIGENCE SUFFERED A VESSEL OF THE UNITED STATES TO BE LOST BY FIRE."

Not an authorized charge—An officer was charged with the above offense. *Held*, it was not one recognized in naval procedure, not having been specially provided for in the Articles for the government of the Navy. *Held further*, this error in itself was not sufficient to invalidate the proceedings, at least in time of war when the limitation of punishments prescribed by the President do not apply to sentences of general courts-martial. (C. M. O. 23, 1918, 2.)

TRANSFER.

Naval Reserve Flying Corps. *See* NAVAL RESERVE FLYING CORPS.

TREASON.

Sedition is conduct tending toward treason. *See* SEDITION.

TRIALS.

Multiplicity of trials is improper where the accused could have been tried on all of the offenses in one trial—Offenses should not be allowed to accumulate and then each offense made the subject of a separate trial. Multiplicity of trials is undesirable and the accused should only be tried once, with separate specifications preferred against him for each separate offense, as is provided in Naval Courts and Boards, 1917, page 250. If, however, the accused commits an offense after the convening authority has directed his trial for an offense but prior to the convening of the court, the proper procedure for the convening authority then is to show affirmatively in the additional orders that intelligence of the latest offense had not reached the convening authority at the time of issuance of the original orders, and direct that the accused be tried for both offenses at the one trial. (File 27217-4139, Sec. Navy, 31 Mar., 1920; C. M. O. 60, 1920, 19.)

TRIAL IN JOINDER.

Improper use of a specification. *See* CRITICISM OF COURTS-MARTIAL.

TYPHOID PROPHYLACTIC.

Is mandatory—Article I-3212, Naval Instructions, 1913, prescribing the administration of typhoid prophylactic to all persons of the Navy and Marine Corps who are under 45 years of age, or who have not had a well-defined case of typhoid fever, is mandatory and does not admit of exceptions. (C. M. O. 16, 1916, 9; for case in which enlisted men have refused to take this treatment, *see* G. C. M. Rec. No. 24756, 24881, 21477, and 31931.)

UNIFORM.

1. **Discrimination against, prohibited by statute in the State of Virginia**—As a result of representations made by the department to the officials of the State of Virginia in connection with various complaints of discrimination against enlisted men of the Navy in public places of amusement in the vicinity of Norfolk, Va., there has been passed by the legislature of that State an act prohibiting discrimination against the uniform of the Navy, which will be effective after June 18, 1916. (*See* File 23243-77: 5; *also* File 23243-50; C. M. O. 9, 1916, 9.)
2. **Federal statute relating to its protection.** (C. M. O. 46, 1916, 6.)

3. **May be worn by former members of the naval service**—Under the provision of section 8 of the naval appropriation act approved June 4, 1920, any person who has served in the Navy or Marine Corps of the United States in the present war may, upon receiving an honorable discharge and returning to civil life permanently retain one complete suit of outer uniform clothing, including overcoat and such articles of personal apparel and equipment as may be authorized by the Secretary of the Navy, and may wear it for a period of three months after his discharge; and thereafter on occasions of ceremony he may wear the uniform of the highest grade he has held by brevet or other commission. (File 29226–21, 23 Dec., 1920; C. M. O. 151, 1920, 19.)

4. **Wearing of, by inactive reservists.** *See* NAVAL RESERVE FORCE.

UNLAWFUL.

Mere allegation that an act was, is not sufficient. *See* CHARGES AND SPECIFICATIONS. (C. M. O. 280, 10; 321, 13; 1919.)

UNLAWFUL ORDER.

No justification to accused that he obeyed an. *See* ACCOMPLICE. (C. M. O. 212, 1919, 5.)

UNLAWFUL ACT.

Soldier—Not bound to obey an order of his superior to do an unlawful act. *See* ACCOMPLICE. (C. M. O. 212, 1919, 5.)

USAGE.

What constitutes—Usage consists merely of a repetition of acts (Naval Courts and Boards, 1917, p. 9). "It refers to a general habit, mode, or course of procedure." (Words and Phrases, vol. 4, p. 1102.) It being shown in evidence that it is customary or usual for a person or persons to do a certain act under certain conditions, the jury or court can consider this as to whether or not, under similar conditions, a similar act sought to be established occurred. (*But see* Wigmore on Evidence, vol. 1, secs. 92–99; McKelvey on Evidence, 2d ed., p. 107, sec. 57; C. M. O. 133, 1920, 11.)

VACANCY.

Created by retirement. *See* RETIREMENT.

VENEREAL DISEASE.

Contraction of—The contraction of venereal disease does not necessarily constitute an offense. Navy General Order No. 530 makes it an offense under certain circumstances only, i. e., proper instructions having been given, failure to report exposure and to take prophylactic treatment shall be regarded as disobedience of orders. Men developing venereal diseases under these circumstances have then committed an offense triable by court-martial. The specification must specifically allege that the accused had been instructed in accordance with Navy General Order No. 530, and that he failed to report exposure and to take prophylactic treatment. But said order does not contemplate that if in obedience to it a man has taken prophylactic treatment, yet contracts a venereal disease, he shall be punished. (File 26287–7068, Sec. Navy, 20 Oct., 1920; C. M. O. 127, 1920, 12.)

VESSEL.

Government—Authority of civil authorities to divert from its course. *See* CIVIL AUTHORITIES. (C. M. O. 237, 1919, 18.)

VIRGIN ISLANDS.

Procedure of civil courts—In presenting to the circuit court of appeals for the third circuit, for review, cases arising in the civil courts, the entire record will be reviewed both as to the law and the facts. (File 28759–504, 5 May, 1920; C. M. O. 119, 1920, 19.)

VIRGINIA, STATE OF.

Discrimination against the uniform—Statute prohibiting. (C. M. O. 9, 1916, 9.)

VOLUNTARY SERVICE.

Neither the department or any officer thereof is allowed to accept voluntary service—Section 3579, Revised Statutes, as amended by the act of March 3, 1905 (33 Stat. 557), and the act of February 27, 1906 (34 Stat. 19), forbids the acceptance by the Navy Department or any officer serving thereunder, of any voluntary service except "in cases of sudden emergency involving a loss of human life or the destruction of property." (File 28602–93, J. A. G., Mar. 31, 1917; C. M. O. 32, 1917, 7.)

VOTE.
Right to—Officers, enlisted men, both active and retired, have the right to vote if they qualify as electors under the laws of the State in which they reside. (For discussion *see* C. M. O. 280, 1919, 12–14.) *See* CIVIL RIGHTS.

WAIVER.
1. **Effect of waiver of right to appear in person before Examining Board.** (C. M. O. 9, 1921, 14.)
2. **Physical disability**—Waiver of, not lawful on examination for promotion. (C. M. O. 22, 1917, 10.) *See* PROMOTION.
3. **Verification of testimony.** *See* TESTIMONY.

WAR.
1. **Desertion in time of war.** *See* DESERTION.
2. **Limitation of punishment for perjury.** *See* PERJURY.
3. **Retirement of enlisted men**—Credit for double time. (C. M. O. 37, 1916.)

WARNING.
1. **Confession**—Not necessary. (C. M. O. 3, 1916, 6.)

WARDROOM MESS.
1. **Officer's pay accounts can not be checked for indebtedness to wardroom mess.** (C. M. O. 37, 1917, 12.)

WAR POWERS OF CONGRESS.
1. **Civilians may be subject to jurisdiction of courts-martial.** *See* CIVILIANS.

WARRANT OFFICERS. *See also* COMMISSIONED WARRANT OFFICERS.
1. **Commissions in the Navy**—Warrant officers with noncontinuous service, are eligible for transfer to a permanent commissioned grade in the Navy if their total service amounts to more than 15 years and they meet the other requirements. (File 29226–11: 1, J. A. G., 12 Oct., 1920; C. M. O. 127, 1920, 15.)
2. **Effect of revocation of acting appointment.** (C. M. O. 8, 1921, 19.)
3. **Eligibility to appointment as lieutenant (junior grade), naval construction corps**—There is no legal objection to the temporary appointment of a chief carpenter who is over 50 years of age, to the grade of assistant naval constructor with the rank of lieutenant (junior grade), the act of 22 May, 1917, confining its prohibition to the appointment of commissioned warrant officers, warrant officers, and enlisted men who are over 50 years of age to the grade of ensign. (File 5038–25, J. A. G., 11 Aug. 1917; C. M. O., 53, 1917, 12.)
4. **Form of sentence, in which it is desired to adjudge a loss of seniority**—A warrant officer was sentenced to lose three numbers in his grade. Under the direction of the department the court revoked its sentence and substituted therefor the following which was the form evolved by the department in cases where it was desired to adjudge a loss of seniority in sentencing a warrant officer: "The court, therefore, sentences him, * * * boatswain, U. S. N., to the following punishments: To lose three (3) months seniority in the date of his warrant as boatswain; to lose corresponding rank on the list of boatswains of the Navy; and to lose during a period of three (3) months, the difference between his present rate of pay and the next lower rate of graded pay as boatswain." (C. M. O. 18, 1917.)
5. **Service of enlisted men as.** *See* SERVICE.
6. **Temporary.** *See also* MARINE CORPS.
7. **Temporary appointment to the grade of chief warrant officer.** *See* APPOINTMENTS, TEMPORARY.

WAR RISK INSURANCE.
1. **Effect of that act on previous pension laws.** *See* PENSION.

WEIGHT OF EVIDENCE. *See also* EVIDENCE, DOCUMENTARY.
1. **Court of inquiry proceedings**—The evidence adduced and preserved before courts of inquiry is superior in every respect to depositions. (C. M. O. 46, 1917, 17.)

WIDOW'S PENSION. *See* PENSION.

WITHDRAWAL AND SUBSTITUTION OF PLEA. *See* PLEA.

WITNESS.

1. **Accomplice as**—"An accomplice, separately indicted and separately tried, is a competent witness against the other defendants" (12 Cyc. 451). "Although the uncorroborated testimony of an accomplice should be received with caution, yet there is no rule of law forbidding the conviction upon his testimony alone" (Steinham *v.* U. S., Fed. Cas. No. 13355). "The jury may convict on the testimony of an accomplice alone, but his testimony should be corroborated in some parts, at least, by other evidence." (U. S. *v.* Kessler, Fed. Cas. No. 15528.) (C. M. O. No. 106, 1918; G. C. M. Rec. No. 38991.)
2. **Accused**—As witness in extenuation. *See* WITNESS.
3. **Same**—Waives his constitutional privilege, has the same status as any other witness, and is thus subject to be recalled at any time during the proceedings, at the discretion of the court, for the purpose of examination or further cross-examination, to explain matters brought out in his original testimony. (*See* Barnet *v.* State, 176 S. W. 580; State *v.* Kennade, 26 S. W. 347; 40 Cyc. 2477-44.) (C. M. O. 150, 1919, 2.)
4. **Accused**—Right to be confronted by witnesses against him, may be waived by the accused. (C. M. O. 157, 1919, 2.)
5. **Same**—Scope of cross-examination—It has been held, and properly so, where the accused took the stand to testify, and did testify, only as to the date of his confinement in arrest, that it would be inquisitorial and illegitimate to cross-examine him as to other facts of the merits of the case. (Winthrop's Military Law and Precedents, vol. 1, p. 509, note,) (File 26251-15777; G. C. M. Rec. No. 37122; C. M. O. 37, 1918, 16.)
6. **Adverse comment on failure of accused to testify.** *See* CONSTITUTIONAL RIGHTS OF ACCUSED.
7. **Admissibility of opinions.** (C. M. O. 12, 1921, 8.)
8. **Agreement between testimony of.** (C. M. O. 5, 1921, 17.)
9. **Attack on their credibility**—Counsel for an accused sought to question a witness for the prosecution as to whether or not in a previous case he had testified in a certain manner. The judge advocate objected on the ground that it was an attempt to transport into the record testimony given by the witness before another court, and was therefore inadmissible. Counsel for the accused replied that the question was asked to test the credibility of the witness. The court sustained the judge advocate. *Held*, That the nature of the question and the statement of counsel for the accused indicated an effort on the part of the defense to attack the credibility of the witness in connection with his testimony for the prosecution in the case in question—that is, it was an attempt to impeach the witness which the accused had a right to do, and it was error for the court to deny him the right. (Naval Courts and Boards, 1917, pp. 164, 165; Sec. 165, 168; Naval Digest, 1916, p. 284; C. M. O. 30, 1918, 23.)
10. **Attendance of**—Court erred in not taking an adjournment before the close of trial in order that defense might procure attendance of witness requested to testify to a certain charge and the specifications thereunder, resulted in disapproval of said charge and the specifications thereunder. (C. M. O. 144, 1919.)
11. **Bias of**—Assigned as basis for new trial. (C. M. O. 275, 1919.)
12. **Challenge of member of court who is also.** (C. M. O. 296, 1919, 11.)
13. **Civilian in employ of Government**—Expenses for. (File 1562-03; 22 J. A. G. 314.)
14. **Common-law wife, incompetent**—There was called by the prosecution a witness whose competency the defense had challenged on the ground that she was the common-law wife of the accused. The defense introduced testimony to show the relation existing between the accused and the witness and that such relation created a common-law marriage relation between them. Counsel for the defense also presented a brief to the court setting forth the laws of the State governing such status which laws supported the counsel's contention. The court properly sustained the objection o the defense and declared the witness incompetent on the ground that she was the common-law wife of the accused. (G. C. M. Rec. No. 32186; C. M, O. 22, 1916, 8.)
15. **Protection of from abuse of counsel**—"It is noted with regret that the court failed in its duty of protecting the witnesses from the abuse of counsel for the accused. Although counsel for the accused took advantage of every possible opportunity to vilify and abuse the Government's witnesses and others connected with the prosecution, and most of his assaults were based upon absolutely no evidence before the court of misdeeds or bad character, only on one occasion did the court assert its authority to stop his abuse and vilification." (G. C. M. Rec. No. 45684; C. M. O. 317, 1919.)
16. **Competency of child as**—Intelligence and not age is the test. (C. M. O. 253 ,1919.)

17. **Competency**—Witness has no right to introduce evidence or cross-examine witnesses in case his competency is questioned. (C. M. O. 32, 1917, 7.)
18. **Compulsory attendance.** *See* COURTS-MARTIAL.
19. **Conclusions**—Testimony as to conclusions of witness improperly allowed. (C. M. O. 78, 1917, 3.)
20. **Credibility.** *See* CREDIBILITY.
21. **Same**—There is a decision of the Supreme Court which has been applied by the Federal courts to evidence in criminal cases to the effect that in the absence of direct evidence contradicting the testimony of particular witnesses, nevertheless it is for the court to determine their credibility by considering the reasonableness of their statements and the manner in which they gave their testimony. It has been held that the reasonableness of testimony may be considered by a court of appeals, but the manner in which it was given can not be, of course, correctly portrayed. (Quock Ting *v.* U. S., 140 U. S., 417, 420, 421; Norton *v.* U. S., 205 Fed. Rep. 593, 601.) It is, however, to be emphasized that as a general rule the uncontradicted testimony of a witness who is not impeached should be accepted as establishing the point concerning which such testimony is given where it is not in itself improbable, and that only in exceptional cases should such testimony be rejected. (C. M. O. 9, 1916, 7.)
22. **Same**—Though the testimony as it appears in the record apparently supports the specification of (certain) charges, the court was governed in arriving at its findings (acquittal) by a lack of credibility on the part of the witnesses, which is not apparent in the written form—in the opinion of the convening authority. (C. M. O. 225, 1919.)
23. **Cross-examination**—Records failed to show that neither court, judge advocate nor accused (counsel) desired to question witnesses. (C. M. O. 69, 1917.)
24. **Expert**—A court shall require that expert witnesses be qualified as experts before receiving their testimony as such. (C. M. O. 12, 1917, 2, citing C. M. O. 24, 22; 51, 1914, 6–8; 19, 1915, 55.)
25. **Same**—Witnesses should be qualified as such. (C. M. O. 12, 1917; 17, 1917, 3.)
25. **Handwriting expert**—Must be properly qualified as such. If a witness has seen the accused write or was familiar with his handwriting, he may have been competent to identify said handwriting, or qualified to give an opinion as to whether or not the same was that of the accused, but otherwise he was incompetent unless qualified as a handwriting expert. (File 26262–4736, G. C. M. Rec. No. 39161; C. M. O. 114, 1918.)
27. **Immunity of**—Witnesses having been ordered to answer an alleged incriminating question, the only immunity arising therefrom is that such evidence shall not be used against him in a future criminal proceeding. (U. S. *v.* Prescott, 2 Dill, 405–27; Fed. Cas. No. 16085.) (C. M. O. 212, 1919, 5.)
28. **Judge advcate as, must be sworn**—The swearing of a witness is mandatory and the judge advocate occupies no peculiar status in this respect, but before testifying must be sworn as any other witness, and failure to do so constitutes a fatal irregularity, so far as his testimony is concerned; and such unsworn testimony as is given should be expunged from the record and the consideration of the court. (File 26262–4311; G. C. M. Rec. No. 38021; C. M. O. 71, 1918.)
29. **Latitude allowed court in examination**—There may arise conditions under which an exception may be made to the general rule, to wit, where it is clearly evident that the judge advocate is inexperienced, the court may find it necessary to propound questions not strictly confined to the limits above outlined (C. M. O. 19, 1915, 3–5), and may go even farther by suggesting questions to the judge advocate or accused where either has omitted to elicit some material particular. This extension of the scope of the usual limitation prescribed for a court's examination does not include, however, the admitting of improper evidence. Such action is under no circumstances permissible. (File 26251–15777; G. C. M. Rec. No. 27122, citing C. M. O. 19, 1915, 3–5, cited in Naval Digest, 1916, par. 40, p. 649; C. M. O. 37, 1918, 18.)
30. **Not disqualified because present in court during testimony of previous witness**—A witness who is present in the court room during the testimony of previous witnesses, even in violation of the court's order, is not thereby disqualified from testifying, but such fact may be brought out in the cross-examination as affecting the credibility of the witness. (File 26262–5158, G. C. M. Rec. No. 40307; C. M. O. 174, 1918, 21.)
30. **One witness**—Sufficient to establish a prima facie case, etc. *See* PRIMA FACIE.

31. **Procedure, where their competency is questioned**—A summary court-martial would be justified in exercising its discretion as to whether or not a witness before it, whose competency is questioned, should be required to withdraw pending the taking of testimony by it as to such competency; its decision either way would not invalidate the proceedings. A witness whose competency is questioned has no right to introduce evidence with a view to establishing the same, or to examine witnesses testifying with reference thereto, but such examination should be conducted by the court or by the parties to the trial. (File 76276–163, J. A. G., Apr. 9, 1917; C. M. O. 32, 1917, 7.)
32. **Prejudice**—Evidence to show bias or prejudice of witness is admissible. (C. M. O. 82, 1917, 2–3.)
33. **Privilege of not answering incriminating question**—Properly denied, the witness having been previously tried in connection with the occurrence upon which the charges in the instant case are based. (C. M. O. 195, 1919.)
34. **Privilege**—Where certain incriminating questions, not specifically objected to, were answered without specific objection due to court's statement that witness would be compelled to answer. "This mere general assertion of privilege is not sufficient: the witness must claim his privilege to each specific question, stating his reason therefor." (C. M. O. 212, 1919, 5.)
35. **Questions by the court**—A ruling by the court that questions put to a witness by the court were not open to objection by the accused or his counsel was held to be error. (Naval Digest, 1916, p. 649, "Witnesses;" C. M. O. 10, 1918.)
36. **Same**—Should, in general, be limited to clarifying testimony already given. (C. M. O. 1, 1921, 16.)
37. **Questioned by the court**—When a witness is sworn, the party who calls him commences the examination. A reexamination of the witness by the first party follows the cross-examination upon such points as the latter may have touched on, then a recross-examination by the opposite party if desired, and then the court puts such questions as they may deem requisite to elicit the whole truth, calling for explanation of previous portions of the testimony, or requiring a fuller statement of circumstances of facts which had been but slightly referred to. A court-martial has the right to put questions to a witness at any stage of the examination, but such a course has many undesirable features and frequently confuses the proceedings; it perplexes the mind of the party and may, to some degree, derange his preconceived order of examination. This practice should not be indulged in except in rare instances, and then only sparingly. Besides the court has an opportunity to examine the witness in the prescribed method of procedure and may then, if necessary, clear up any doubtful points in the testimony of witnesses. (File 12821–186, J. A. G., 2 Sept., 1919; C. M. O. 119, 1920, 14.)
38. **Refreshing memory.** *See* EVIDENCE.
39. **Same.** *See* EVIDENCE, DOCUMENTARY.
40. **Same**—A court improperly allowed a witness to refresh his memory by holding a telephone conversation and obtaining testimony from another person, which conversation the witness was then allowed to repeat in order to verify a name previously given as that of a person by whom some jewelry had been pawned. (Index Digest 1914, p. 43; G. C. M. Rec. No. 31784; C. M. O. 9, 1916, 8.)
41. **Sanity of, may be determined by evidence of associates as well as that of specialists.** (C. M. O. 3, 1921, 14.)
42. **When sanity of has been questioned, court must judicially determine facts before permitting witness to testify.** (C. M. O. 3, 1921, 14.)
43. **Should testify as to facts and not as to their opinions.** *See* EVIDENCE.
44. **Verification of testimony**—Testimony of witness should be verified by him before member of court who was absent when testimony taken. (C. M. O. 84, 1917.)
45. **Wife as witness**—Court erred in allowing wife to testify in behalf of accused. (C. M. O. 81, 1917.)
46. **Verification of testimony not subject to waiver**—The verification of the testimony of witnesses is not a matter to be waived at the discretion of a court, even if consented to by the witness, the accused or his counsel, and the judge advocate. (File 26251–17168, G. C. M. Rec. No. 39173; C. M. O. 141, 1918, 26.) *But see* section 175, page 166, Naval Courts and Boards, 1917, Changes No 4, which overrules above.

WITNESS IN EXTENUATION.

1. **Accused as.** *See* ACCUSED.

WOMEN.

1. **Enrollment in naval coast defense reserve.** *See* NAVAL COAST DEFENSE RESERVE.
2. **Improperly transported on Government vessel.** (C. M. O. 5, 1920.)

WORDS AND PHRASES.

1. **"Aliunde"**—From another place, from another source. (Stimson's Law Glossary; C. M. O. 48, 1920, 23.)
2. **"Expressio unius est exclusio alterius,"** which means that "the expression of one thing is the exclusion of another." (C. M. O. 34, 1918, 2.)
3. **"Fail"**—Applied by court in the sense of "undone" rather than in its legal sense "delinquency."
4. **Same**—In naval procedure, means substantially the same as "neglect." (C. M. O. 110, 1919.)
5. **"Military"**—Defined by Congress to include "naval." (Act 6 Oct., 1917, 40 Stat. 402.) (C. M. O. 39, 1919, 20.)
6. **Modicum**—"A little; a small quantity or portion; a limited amount or supply." (Webster's Dictionary.) (*See* C. M. O. 39, 1913.)
7. **"Neglect"**—Substantially synonymous, in naval procedure, with "fail" (C. M. O. 110, 1919.)
8. **"Possibility"**—As distinguished from "reasonable doubt." (C. M. O. 17, 1919.)
9. **Scienter**—Definition—The allegation in a pleading of knowledge on the part of a defendant or person accused, which is necessary to charge upon him the consequences of a crime or tort. (Bouvier's Law Dictionary, vol. 3, p. 3013.)
10. **"Well knowing"**—Words found not proved—As the specification in which said words were used would support the charge without their use they were considered not vital to the specification. (C. M. O. 182, 1919, 2.)
11. **"Willful"**—A word of familiar use in every branch of the law, and it amounts to nothing more than this: That the person knows what he is doing and is a free agent. (C. M. O. 208, 1919, 8.)

WRITTEN STATEMENTS.

1. **Not admissible in evidence in substitution for testimony of witness before court.** (File 26262-4918; G. C. M. Rec. No. 39689; C. M. O. 114, 1918, 30.)

WRONG TITLE. *See* ACCUSED.